

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

CAMERON INTERNATIONAL CORPORATION

VS.

October 16, 2020

NITRO FLUIDS LLC

BUTCH'S RATHOLE & ANCHOR SERVICE, INC. W-20-CV-124

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* CIVIL ACTION NO. W-20-CV-125

BEFORE THE HONORABLE ALAN D ALBRIGHT
MARKMAN HEARING (via Zoom)

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1 Proceedings recorded by mechanical stenography, transcript
2 produced by computer-aided transcription.

09:02 3 (October 16, 2020, 9:01 a.m.)

09:02 4 MS. MILES: Markman hearing in Civil Actions W-20-CV-125,
09:02 5 styled Cameron International Corporation versus Nitro Fluids
09:02 6 LLC, and Case No. W-20-CV-124, styled Cameron International
09:02 7 Corporation versus Butch's Rathole and Anchor Service,
09:02 8 Incorporated.

09:02 9 THE COURT: Good morning, everyone. If I could hear
09:02 10 announcements first from the plaintiff and then from each of
09:02 11 the defendants.

09:02 12 MR. KEVILLE: Good morning, Your Honor. For the plaintiff
09:02 13 Cameron, John Keville from Winston and Strawn. With me are
09:02 14 Merritt Westcott and William Logan. And also on today is Robin
09:02 15 Nava and Brigitte Echols, both at home, are in-house Cameron's
09:02 16 parent, Schlumberger.

09:03 17 THE COURT: Very good. Thank you, sir.

09:03 18 MR. HENRY: Good morning, Your Honor. David Henry on
09:03 19 behalf of Butch's Rathole and Anchor Service, Inc. And along
09:03 20 with me is David DeZern, and though not yet admitted to the
09:03 21 Western District, our colleague Alex Uber is along with us as
09:03 22 well.

09:03 23 THE COURT: Okay. Someone's on mute, I think.

09:03 24 MR. CABELLO: My apologies, Your Honor. David Cabello,
09:03 25 Cabello Hall Zinda, on behalf of the defendant Nitro. And I

09:03 1 have with me Stephen Zinda. And Mr. Hall also is in the
09:03 2 background here. He hasn't logged on, but he's here with us.

09:03 3 THE COURT: Very good. And to anyone who's here that is
09:03 4 not counsel but a client representative or in-house, I
09:03 5 appreciate you taking the time to be here and attend this
09:03 6 hearing.

09:03 7 Give me one second to get ready. Okie dokie.

09:04 8 We sent out yesterday our preliminary constructions and
09:04 9 what we are going take up this morning. The first claim terms
09:04 10 we are going to take up are "fluid conduit" and a "single fluid
09:04 11 conduit."

09:04 12 The Court's preliminary construction was plain and
09:04 13 ordinary meaning. To the extent someone would like to argue
09:04 14 why that -- they -- in support of the argument that it was
09:04 15 indefinite, I'm happy to hear that. You may begin.

09:04 16 MR. HENRY: Yes, Your Honor. I'll start my screen share
09:04 17 here.

09:04 18 THE COURT: Okay.

09:04 19 MR. HENRY: Yes. We'll be arguing both the "single fluid
09:04 20 conduit" and the other term on the slide here. Couple of --

09:05 21 THE COURT: Mr. Henry, let me interrupt you. I failed to
09:05 22 put on the record that you all have absolutely the best case
09:05 23 style that I've had yet, Butch's Rathole and Anchor Service,
09:05 24 Inc. It may be the winner for the year. So it's great to have
09:05 25 a case that -- I never get any publicity, but if I were to

09:05 1 happen to, this would be one I would be happy to be attached
09:05 2 to.

09:05 3 (Laughter.)

09:05 4 MR. HENRY: Thank you, Your Honor.

09:05 5 Well, a couple of over-arching comments that really apply
09:05 6 to both of the terms we'll be arguing today on indefiniteness.
09:05 7 Now, I'll certainly not read these slides to you.

09:05 8 But because each and every one of the building blocks of
09:05 9 these patents at issue are, you know, old elements, every
09:05 10 single element, which is of course not unusual, but the
09:06 11 specific arrangement and sequence and constituency of the claim
09:06 12 combinations with precision are what are going to be needed to
09:06 13 inform the public what they can and cannot do.

09:06 14 Now, with respect to both of the terms that we're arguing
09:06 15 today are indefinite, we have a problematic, in our opinion,
09:06 16 situation where we have a combination basically consisting of
09:06 17 type elements, "one and only one," and in the case of the other
09:06 18 term, and "single" in this case, consisting of only a certain
09:06 19 constituency of elements.

09:06 20 But then we also have comprising elements. In this case
09:06 21 the "fluid conduit" as we'll get through in just a moment --
09:06 22 and we'll be skipping to Slide 11 when we get to "single fluid
09:06 23 conduit" by the way.

09:06 24 But we have -- so this combination of elements or parts of
09:06 25 the element that include certain things. But then we also have

09:07 1 this limitation but they can only include certain things. And,
09:07 2 respectfully, we believe that plain and ordinary meaning just
09:07 3 does not inform the public what they can't do.

09:07 4 So if we can skip now to Slide 11.

09:07 5 By way of context, and following in that same theme, we
09:07 6 have of course the element we're arguing, a "single fluid
09:07 7 conduit." But as I pointed out, just again putting it in
09:07 8 context, the claim speaks of the single fluid conduit
09:07 9 "including," and it talks about connection blocks, and it talks
09:07 10 about one or more pipe sections. Then it talks about
09:07 11 "coupled." And, you know, it doesn't say necessarily joined
09:07 12 together or linked. It's just coupled. So there -- we have
09:07 13 things that will include things that couple.

09:08 14 There could be other constituents, but we don't know what
09:08 15 they are. So we have multiple layers of ambiguity here. So
09:08 16 "single fluid conduit." Okay. That in patentese, basically we
09:08 17 would suggest, translates to consisting of one, exactly one,
09:08 18 fluid conduit that comprises. And again, as you saw in the
09:08 19 claim, you know, a connection block, a first one, a second
09:08 20 connection block, one or more pipe sections. And then this
09:08 21 "coupled" between.

09:08 22 As is clear from the patent itself and general knowledge
09:08 23 in the industry, "coupled" doesn't always necessarily mean
09:08 24 connected together. So what else is there? Because of this
09:08 25 upper limit of "single," you know, at some point adding

09:08 1 something as compared to most normal claim limitations, adding
09:08 2 something avoids the scope of this claim. But how much is too
09:09 3 much? Where in the specification, where in the prosecution
09:09 4 history, how do we, how does the public, how does somebody
09:09 5 involved in fracking know when we've reached that one thing too
09:09 6 many?

09:09 7 The second layer of ambiguity has to do with another
09:09 8 limiting term "through only." The claim talks about that the
09:09 9 fracturing fluid can be delivered to the tree through only the
09:09 10 single fluid conduit. And again, there's something that if you
09:09 11 add -- you get outside the scope of the claim, there's an upper
09:09 12 limit here.

09:09 13 So where does that leave us? Well, one option possibly is
09:09 14 that fluid is delivered through only, you know, a pipe and two
09:09 15 connection blocks. And what I have here in the diagram
09:09 16 possibly could satisfy that. That could be the outer bounds.
09:09 17 One more thing than what's shown here, you know, pipe or pipes
09:10 18 between two connection blocks may get you -- that may be the
09:10 19 limit. And adding one more element gets us outside of that.

09:10 20 But then there's an option two, because we don't know the
09:10 21 limit. We don't know what includes, or is included, in that
09:10 22 fluid conduit. There's no really specified limit. And so here
09:10 23 in this diagram perhaps this is the outer limit. We don't
09:10 24 know. But you could have a connection block up at the tree.
09:10 25 You could have a connection block all the way down at the

09:10 1 source. Because there's only this coupling language, we don't
09:10 2 know what's in between. And so, you know, this could be the
09:10 3 outer limit.

09:10 4 And so there's always the "so what." Well, the so what
09:10 5 is, if it's first option, then the design around, the thing
09:10 6 that the public can do, is in the case on the right in the
09:10 7 green, would, for example, represent a hose. Well, you add a
09:10 8 hose in parallel, and now the fluid is no longer delivered
09:11 9 through only the single fluid conduit.

09:11 10 But then what if it's option two? Well, here on the right
09:11 11 you see what it would take to design around. It's dramatically
09:11 12 different. It's practically adding an entire second section in
09:11 13 order to avoid that "through only" and through this undefined
09:11 14 including who knows what between one connection block and
09:11 15 another.

09:11 16 So, Your Honor, we -- our position is we simply don't
09:11 17 believe this plain and ordinary meaning informs the public,
09:11 18 informs anyone in the fracking business. What do we add to get
09:11 19 around "single fluid conduit"? You know, simply staying out of
09:11 20 the fracking business just is not a reasonable option.

09:11 21 So, Your Honor, that's our position on that element.

09:11 22 THE COURT: Got it. That makes sense.

09:11 23 I'll hear from the plaintiff.

09:12 24 MS. WESCOTT: Your Honor, this is Merritt Wescott with
09:12 25 Cameron. Can you hear me all right?

09:12 1 THE COURT: Yes, ma'am. Thank you for asking.

09:12 2 MS. WESCOTT: So how about we start -- and William Logan
09:12 3 is going to be running the slides for me today.

09:12 4 How about we start with Slide 6, please?

09:12 5 Your Honor, I think that Butch's goes to great lengths to
09:12 6 contort claim language that is quite clear, almost to the point
09:12 7 of drawing in the mind's eye exactly what is required for the
09:12 8 claim.

09:12 9 If you read the claim, which is up on the screen right
09:12 10 now, it says, "a single fluid conduit coupled to a well
09:13 11 fracturing tree, such that during a fracturing operation,
09:13 12 fracturing fluid is delivered to the well fracturing tree
09:13 13 through only the single fluid conduit, wherein the single fluid
09:13 14 conduit includes a first connection block positioned at the
09:13 15 well fracturing tree, a second connection block and one or more
09:13 16 pipe sections coupled between the first connection block and
09:13 17 the second connection block, such that fracturing fluid can be
09:13 18 routed from the second connection block to the first connection
09:13 19 block through the one or more pipe sections and then to the
09:13 20 well fracturing tree through the first connection block."

09:13 21 This is claiming a single fluid conduit. And the
09:13 22 fracturing fluid is entering a fracturing tree only through the
09:13 23 single fluid conduit, and then it is telling you what the
09:13 24 single fluid conduit must include.

09:13 25 Even if it was not so explicit in the claim language,

09:14 1 which it is --

09:14 2 Can we skip to Slide 8, please? I'm sorry. Slide 9.

09:14 3 What single fluid conduit means here, and the "single" of
09:14 4 single fluid conduit is drawing a distinction between this
09:14 5 system which requires one single fluid conduit into the tree
09:14 6 and prior art systems which include frac iron. In frac iron
09:14 7 system multiple smaller diameter pieces of frac iron are
09:14 8 attached to a fracturing tree. In this system one single fluid
09:14 9 conduit is attached to the fracturing tree.

09:14 10 It's quite plain from the claim language what exactly is
09:14 11 required here. And there's a lot of effort that's gone to
09:14 12 contort the claim language so that it purportedly covers some
09:15 13 kind of situation where the single fluid conduit somehow runs
09:15 14 all the way to the source of the fracturing fluid, which is a
09:15 15 truck that's backed up into the parking lot at the well site.
09:15 16 There's absolutely nothing in the claim language that indicates
09:15 17 that this single fluid conduit must run all the way back up to
09:15 18 a truck backed up in the parking lot.

09:15 19 Your Honor, we think that this claim language is very
09:15 20 clear and would be reasonably understood by a person of skill
09:15 21 in the art and is not indefinite.

09:15 22 THE COURT: Would you go back to the claim, please?

09:15 23 So the way I read it, it wouldn't go -- it wouldn't go, to
09:15 24 take Mr. Henry's point, for example, what could we add? It
09:15 25 could not go beyond the second connection block, right? For

09:15 1 example, of anything that was added beyond the second
09:15 2 connection block would be outside of what comprises that
09:15 3 element, right?

09:15 4 MS. WESTCOTT: Yes, Your Honor.

09:15 5 THE COURT: It says the first connection block -- it says
09:16 6 "one or more pipe sections coupled between the first connection
09:16 7 block and the second connection block." So that's where it
09:16 8 ends, right?

09:16 9 MS. WESTCOTT: The second connection block is where this
09:16 10 claim ends.

09:16 11 THE COURT: Okay.

09:16 12 Mr. Henry, do you want to respond to Ms. Westcott?

09:16 13 MR. HENRY: Yes, Your Honor. First of all, if, as with
09:16 14 other elements, they said only second -- only a first and only
09:16 15 a second or only two, that might be accurate. But, again, we
09:16 16 have this including or effectively comprising language, as I
09:16 17 showed in that earlier diagram where we had a connection block
09:16 18 at the very end.

09:16 19 And when the claim language talks about the elements being
09:16 20 merely coupled, there's nothing whatsoever that rules out there
09:16 21 being a connection block in the middle. There's nothing that
09:16 22 rules that out.

09:16 23 And the other thing that makes this problematic is the
09:16 24 "through only." You know, that is where adding -- again,
09:17 25 adding an element gets you around this claim term. What do we

09:17 1 add? You know, at what point have you added enough to where
09:17 2 it's no longer a single fluid conduit through only which the
09:17 3 frac fluid gets to the tree?

09:17 4 And so the diagram that was criticized as going all the
09:17 5 way to the source, we would say that given the open-ended
09:17 6 construction that Cameron proposes is entirely reasonable. It
09:17 7 could be, you know -- that's one of the ambiguities. It's one
09:17 8 of the options.

09:17 9 So that's my response, Your Honor.

09:17 10 THE COURT: Ms. Westcott?

09:17 11 MS. WESTCOTT: Your Honor, in the situation in which
09:17 12 somebody adds a second connection block, has a first connection
09:17 13 block and then has pipes in series as required by the claims,
09:17 14 one or more pipes, and then adds a second connection block, the
09:18 15 second connection block becomes the connection block of the
09:18 16 claim.

09:18 17 So I'm not sure exactly what the ambiguity here would be.
09:18 18 I mean, the idea that the second connection block can be
09:18 19 somewhere downstream of the manifold and the apparatus that
09:18 20 pressurizes the -- that pressurizes the fracturing fluid and
09:18 21 all the way back up at the truck in the parking lot is not how
09:18 22 any person of ordinary skill in the art would read this claim
09:18 23 language.

09:18 24 THE COURT: Mr. Henry, my concern about your -- my
09:18 25 question about your concern is that it doesn't sound -- and I'm

09:18 1 not one skilled in the art, but it doesn't sound that real
09:18 2 world to me. That one skilled in the art wouldn't be able to
09:18 3 look at this and know beyond which that it would not be
09:18 4 included.

09:19 5 MR. HENRY: Well, Your Honor, if we had -- if we had clear
09:19 6 boundaries of what the single fluid conduit was, that might
09:19 7 take care of it. But it's -- again, it includes comprising
09:19 8 elements.

09:19 9 The problem again, I want to highlight this, is that
09:19 10 according to the claim, the fluid is delivered through only
09:19 11 whatever that is, whatever the components are. They use
09:19 12 including language, not consisting. So the question is, at
09:19 13 what point do you add an element where there's no longer fluid
09:19 14 going "through only"? This is sort of an -- as compared to
09:19 15 like a parallel adding another channel, this is sort of a
09:19 16 linear "through only."

09:19 17 And again, the claim language doesn't limit it in any
09:19 18 shape or form to just two connection blocks. We put it at the
09:19 19 very end just for ease of visualization, but it could have
09:19 20 easily been further, you know, down the chain toward the tree,
09:20 21 and there would be three connection blocks. There's nothing in
09:20 22 the claim that rules that out.

09:20 23 But we don't know if adding that third connection block is
09:20 24 no longer a single fluid conduit, nor whether the fluid at that
09:20 25 point is now being delivered only through that single fluid

09:20 1 conduit.

09:20 2 THE COURT: Ms. Westcott?

09:20 3 MS. WESTCOTT: Your Honor, the language "through only" the
09:20 4 single fluid conduit means when it touches the tree, that fluid
09:20 5 conduit, and it touches the tree at the first connection block,
09:20 6 that is the only way that the fluid is getting into the tree.

09:20 7 And I think that that's quite explicit in the claim language.

09:21 8 And I think that that is what distinguishes this from the prior
09:21 9 art where there are multiple channels of fluid from the -- and
09:21 10 multiple conduits feeding into the fracturing tree.

09:21 11 THE COURT: Mr. Henry, anything else?

09:21 12 MR. HENRY: Your Honor, we stated our position. I won't
09:21 13 waste any more time repeating myself.

09:21 14 THE COURT: You're not wasting time. I will be right
09:21 15 back.

09:21 16 (Pause in proceedings.)

09:24 17 THE COURT: Would Nitro like to add anything from what
09:24 18 Mr. Henry said?

09:24 19 MR. CABELLO: With respect to the indefiniteness, Your
09:24 20 Honor?

09:24 21 THE COURT: With regard to anything about this claim term.

09:25 22 MR. CABELLO: Well, yes, Your Honor. I guess when you
09:25 23 look at this single fluid conduit, and I guess adding on to
09:25 24 Mr. Henry's views, certainly I agree that there could be other
09:25 25 connection blocks because it isn't close-ended.

09:25 1 The Court may recall that we also had a view with respect
09:25 2 to this particular issue, arguing that the position that is
09:25 3 indefinite -- and I don't know if the Court wants me to take
09:25 4 that up at this time, because it kind of goes hand-in-glove
09:25 5 with this term. And if the Court is inviting me to do that, I
09:25 6 will certainly do that, Your Honor. But other than to say that
09:25 7 we certainly agree that the single fluid conduit is indefinite
09:26 8 for the reasons that Mr. Henry says, I have nothing more to
09:26 9 add.

09:26 10 But I do have plenty to add with respect to fluid conduit,
09:26 11 because we do believe that fluid conduit requires an adjustment
09:26 12 joint or a pivot joint, as we've said in the past. And the
09:26 13 disputed issue here relates to whether or not this fluid
09:26 14 conduit should be adjustable.

09:26 15 And we know that the -- that Cameron has taken the view
09:26 16 that what we're trying to do is limit the claim term to the
09:26 17 embodiments that are set forth in the figures, and has cited in
09:26 18 a lot of case law, Phillips, Thorner. And we don't disagree
09:26 19 with the case law there, but we do believe that it's important
09:26 20 to stay focused on what the invention is and the purpose of the
09:27 21 disclosures and what the improvement was over the prior art for
09:27 22 these two inventions, both the '132 and the '645.

09:27 23 I know that the Court doesn't like for us to focus on what
09:27 24 the law is, but we think that certainly the Trustees of
09:27 25 Columbia University, which is on the screen now, is very

09:27 1 important because it is -- it is case law that is directly
09:27 2 relevant to a case such as this where the patent embodiments
09:27 3 are limited to, or exclusively disclose fluid conduits with
09:27 4 some sort of adjustment or some sort of pivot joint.

09:27 5 And so, you know, the focus then is whether or not -- and
09:27 6 you see it there in the highlighted term, "The patentee's
09:27 7 choice of preferred embodiments can shed light on the intended
09:27 8 scope of the claims."

09:27 9 And so if we can go on to the next slide -- Mr. Zinda's
09:28 10 running those slides. You know, we have some further case law
09:28 11 that relates to the invention such as this where it's confined
09:28 12 to no more than the confined structure or method.

09:28 13 If we can move on to the next slide, you'll see that the
09:28 14 prior art -- and certainly there is a confession of the prior
09:28 15 art in the '132 patent, and that is that there are basically
09:28 16 large lines. Those are well-known in the art. And so what
09:28 17 we're trying to solve here is a problem that exists with large
09:28 18 lines.

09:28 19 Let's move on to the next slide.

09:28 20 So what we see here in the prior art is a large line, a
09:28 21 single line. And so we see a single line basically going to
09:28 22 the well. So then we have to ask ourselves, well, what
09:28 23 is special, what is different about that single line? And we
09:29 24 think that that's where these patents are focused.

09:29 25 Can we go to the next slide?

09:29 1 And so when you look at the embodiments set out in the
09:29 2 '132 patent, you see that there is an adjustment piece. So the
09:29 3 manifold is adjustable so that no frac lines are needed from
09:29 4 the manifold to the tree. And so you see this concept of
09:29 5 adjustment joints and pivot joints that are illustrated, not
09:29 6 just in one embodiment, but on all the embodiments. And that's
09:29 7 why we cite the Trustees of Columbia University case, because
09:29 8 it really focuses on our attention on what the patentee
09:29 9 intended -- what the inventor intended was the full scope of
09:29 10 the invention. And that is that this single line include a
09:29 11 pivot joint or a -- or some sort of adjustment.

09:29 12 If we can go to the next slide.

09:29 13 So you see that those adjustment joints and those pivot
09:30 14 joints help to account for the difference in the elevation and
09:30 15 the spacing differences that were cited as the problem to be
09:30 16 solved by these patents. The patents confess that large single
09:30 17 pipes are well-known in the art, and we've shown the Court that
09:30 18 prior art.

09:30 19 And so what are we trying to solve? What is the problem
09:30 20 that the '132 and the '645 patent are trying to solve? And
09:30 21 that is that they're trying to solve differences in elevation,
09:30 22 differences in alignment which can only be solved using these
09:30 23 adjustment joints and these pivot joints that are disclosed in
09:30 24 the '132 and the '645 patent.

09:30 25 Let's go on to the next slide.

09:30 1 And so we see an illustration of some of those adjustment
09:30 2 joints. In this case it's a linear adjustment, so you can see
09:30 3 where in Figure 7 and Figure 8, the length of the pipe, if you
09:31 4 will, the length of the single line can be expanded or
09:31 5 contracted to make up for the alignment issues that the patent
09:31 6 teaches us exist with large single lines.

09:31 7 Let's move on to the next one.

09:31 8 And so we've been criticized, Your Honor, for saying that
09:31 9 there has to be an adjustment and a pivot joint, and we've been
09:31 10 criticized by Cameron because they say that it isn't consistent
09:31 11 with the doctrine of claim differentiation. And certainly as
09:31 12 the Court knows, the doctrine of claim differentiation is
09:31 13 certainly a guiding principle, but it doesn't necessarily
09:31 14 dictate how these claims need to be construed.

09:31 15 We believe that the asserted claims, 9 and 11, and our use
09:31 16 of a pivot or an adjustment joint are certainly very consistent
09:31 17 with the doctrine of claim differentiation if the Court were to
09:32 18 construe the claim term as we have suggested. Then we've shown
09:32 19 in this Venn diagram that Claim 9 includes both rotational
09:32 20 adjustment and lengthwise adjustment. And then Claim 11 refers
09:32 21 to a specific type of adjustment joint, and that is one that
09:32 22 can be expanded lengthwise which is illustrated there for Claim
09:32 23 11, that lengthwise adjustment. But the proffered claim term
09:32 24 construction would include both the rotational and the
09:32 25 lengthwise adjustment.

09:32 1 Let's move on to the next slide.

09:32 2 And, Judge, there's been lot said about Monoline
09:32 3 technology. And so one of the things that Cameron would like
09:32 4 us to believe is that Monoline means a single line, a single
09:32 5 large line. But as we know, the prior art teaches that
09:32 6 seven-inch diameter lines, that's a large line because in
09:32 7 reality all of the commercial embodiments, and certainly
09:33 8 Cameron's commercial embodiments, are seven-inch lines. And so
09:33 9 the seven-inch line was well-known in the art.

09:33 10 But Cameron has coined this word "Monoline technology."
09:33 11 But Monoline doesn't mean a single line. And you'll see in the
09:33 12 highlighted term that the Monoline technology has both swivel
09:33 13 flanges. And they talk about these three degrees of freedom
09:33 14 needed to accommodate the misalignment between the frac tree
09:33 15 and the frac manifold.

09:33 16 And so, again, this slide is very consistent with the
09:33 17 teachings of the patent which arose from -- or arose at the
09:33 18 time of this commercial technology or commercial embodiment,
09:33 19 and that is that there has to be some degree of freedom up to
09:33 20 three.

09:33 21 And so Cameron would like to limit the claims of the '132
09:33 22 patent and certainly the '645 patent to rigid pipe lines that
09:34 23 have no adjustment means. And we believe that the Board of
09:34 24 Columbia University -- or the Trustees of Columbia University
09:34 25 case is right on point, because it requires the Court to look

09:34 1 at what the purpose of the invention is. And that is disclosed
09:34 2 in all the embodiments.

09:34 3 The cases Cameron cites are certainly on point where the
09:34 4 Court would be -- would be limiting the invention to a single
09:34 5 embodiment that's illustrated. But if we look at the patents,
09:34 6 both the '132 and the '645 patent, we see that in all
09:34 7 instances, in all embodiments, Cameron has disclosed, and we
09:34 8 believe claimed, embodiments that have at least one degree of
09:34 9 freedom in the claims and certainly in the embodiments that are
09:34 10 disclosed in the patent.

09:34 11 Let's go to the next slide.

09:34 12 And so the next slide basically deals with the connection
09:35 13 block, Your Honor. And if you'd like, I'm happy to take that
09:35 14 up, the position of that which we contend is indefinite. But
09:35 15 for that, let me stop and see if the Court has any questions.

09:35 16 But I do have something further to add with respect to the
09:35 17 connection block.

09:35 18 THE COURT: No. Why don't you wrap up so I can give
09:35 19 Ms. Westcott an opportunity to respond?

09:35 20 MR. CABELLO: All right. Well, then let me go on to the
09:35 21 connection block. Oh, I'm sorry. Wrap up with the connection
09:35 22 block or wrap up with the --

09:35 23 (Clarification by the reporter.)

09:35 24 MR. CABELLO: Your Honor, I'm going to stop there on fluid
09:35 25 conduit. I think I've said enough. But as I said, I would

09:35 1 like to at least take up connection block whenever the Court's
09:35 2 ready for it.

09:35 3 (Technical issues.)

09:35 4 (Clarification by the reporter.)

09:36 5 THE COURT: Can everyone mute other than me?

09:36 6 Mr. Cabello, why don't you tell me what it -- why don't
09:36 7 you wrap up anything you'd like to say with regard to either
09:36 8 fluid conduit or single fluid conduit?

09:37 9 MR. CABELLO: That's all we have, Your Honor. As I said,
09:37 10 the next term I believe is "connection block," and so we'll
09:37 11 take that up in order.

09:37 12 THE COURT: Evan? I don't -- I'm just checking. I didn't
09:37 13 see that we had -- I thought the next one was rigid fluid
09:37 14 pathway.

09:37 15 MR. CABELLO: I'm sorry, Your Honor. When I say
09:37 16 "connection block," I'm talking about the term "positioned at"
09:37 17 which is with respect to the connection block, but...

09:37 18 THE COURT: Mr. Cabello, we're missing each other here.
09:37 19 What is it that you want to take up with connection block? Is
09:37 20 it the claim term?

09:37 21 MR. CABELLO: It is the "positioned at." So the term is
09:37 22 "first connection block positioned at" which I thought was --

09:37 23 THE COURT: We're not at -- we're going to get to
09:37 24 "positioned at" in three more claim terms.

09:38 25 MR. CABELLO: And that was my understanding, Your Honor.

09:38 1 With that, I'll stop.

09:38 2 THE COURT: Okay. Then we're on the same page.

09:38 3 So, Ms. Westcott, would you respond to anything that was
09:38 4 just said about single fluid conduit?

09:38 5 MS. WESTCOTT: Yes, Your Honor. So just to be clear,
09:38 6 Nitro did not dispute "single fluid conduit," and it did not
09:38 7 make an argument that that claim term was indefinite. So we
09:38 8 object to their attempt here to try to tag on an indefiniteness
09:38 9 argument at the last minute.

09:38 10 What Nitro did argue was that "fluid conduit" should be
09:38 11 limited to include either an adjustment joint or a pivot joint.

09:38 12 Looking at Slide 10, you can tell even from the claim
09:38 13 language itself that this is inappropriate. Basically what it
09:39 14 says here is that the single fluid conduit includes a first
09:39 15 connection block and a second connection block, block and pipe
09:39 16 sections between them. Okay? It does not say that it includes
09:39 17 an adjustment joint. It does not say that it includes a pivot
09:39 18 joint.

09:39 19 Claim 11, which depends directly from Claim 9, does add on
09:39 20 an adjustment joint, and that's the only thing that it adds.

09:39 21 Go to Slide 11, please. Back up just one. Thank you.

09:39 22 Case law is quite clear that claim differentiation can
09:39 23 inform the meaning of claim terms, and especially where the
09:39 24 only thing added in a dependent claim is the difference between
09:39 25 that claim and the claim language of the independent claim.

09:39 1 Here there is no indication that there should be any adjustment
09:39 2 components in the language of the independent claim, Claim 9.

09:40 3 With regard to adjustability, though --

09:40 4 Would you please back up to Claim 10 for a moment?

09:40 5 With regard to adjustability though, this system in
09:40 6 Claim 9 is linearly adjustable, because you can add one or more
09:40 7 pipe sections to increase the length of the pipe between the
09:40 8 connection blocks.

09:40 9 So to the extent that Nitro believes that adjustability is
09:40 10 required, that requirement is met by Claim 9. And it can be
09:40 11 met without having to add a particularized adjustment joint.

09:40 12 Secondly, Nitro is incorrect that the specification states
09:40 13 that the invention must include adjustment joints or pivot
09:40 14 joints. Specifically, the abstract of the patent says that
09:40 15 adjustment joints may be added and that pivot joints can be
09:40 16 included. It also states at Column 1, Lines 58 through 64,
09:41 17 which is not what is on the screen right now but I will read to
09:41 18 it you.

09:41 19 It says, "Certain aspects of some embodiments are
09:41 20 disclosed herein and are set forth below. It should be
09:41 21 understood that these aspects are presented merely to provide
09:41 22 the reader with a brief summary of certain forms the invention
09:41 23 might take and that these aspects are not intended to limit the
09:41 24 scope of the invention. Indeed, the invention may encompass a
09:41 25 variety of aspects that may not be set forth below."

09:41 1 And it further states at the top of Column 2 that in one
09:41 2 embodiment the fracturing manifold includes an adjustment
09:41 3 joint, which you can see at the top there of Slide 12.

09:41 4 As is well-known case law, the claims should not be
09:41 5 limited to a preferred embodiment shown or described in the
09:41 6 specification even if that is the only embodiment shown or
09:41 7 described in the specification, and that is not the case here.
09:42 8 The specification is clear here, and the claims are clear here,
09:42 9 that "fluid conduit" should not be read to include adjustable
09:42 10 joints of any kind, be that pivot joints or adjustment joints.

09:42 11 And, Your Honor, if there's any response -- essentially it
09:42 12 should be read as its plain and ordinary meaning. A person of
09:42 13 skill in the art knows what a fluid conduit is. They can tell
09:42 14 what a fluid conduit is in the specification. The
09:42 15 specification does not indicate, nor do the claims indicate
09:42 16 that adjustment joints of any kind should be read into the
09:42 17 construction of that term.

09:42 18 THE COURT: Mr. Cabello?

09:42 19 MR. CABELLO: Your Honor, I was -- I was pleased to hear
09:42 20 Ms. Westcott agree that there can be some adjustment in the
09:43 21 fluid conduit.

09:43 22 Let me go to Slide 2, Your Honor, of our presentation.
09:43 23 And, you know, given that Ms. Westcott is suggesting that there
09:43 24 can be some adjustment, I'm thinking that one possible
09:43 25 compromise might be that if we change Nitro's proposal to

09:43 1 "adjustable channel for conveying fluid," which comprises this
09:43 2 adjustment that Ms. Westcott is talking about. So it would be
09:43 3 "adjustable channel for conveying fluid, comprising linear
09:43 4 adjustment or a pivot joint."

09:43 5 This would take care of the adjustable feature that we
09:43 6 believe exists that is different in this patent over the prior
09:43 7 art.

09:43 8 As you'll notice when we display the prior art, there was
09:43 9 a solid channel going from the source of the fracking fluid to
09:44 10 the well. And if there is going to be an adjustment by adding
09:44 11 different spool pieces, then I would proffer that one comprise
09:44 12 might be in changing this claim term to "adjustable channel for
09:44 13 conveying fluid comprising linear adjustment or a pivot joint."

09:44 14 THE COURT: My guess is it's unlikely Ms. Westcott is
09:44 15 going to agree to the adjustment joint or pivot joint, but I'll
09:44 16 let her speak for herself.

09:44 17 MS. WESTCOTT: You're correct, Your Honor. The
09:44 18 adjustability of Claim 9 is not inherent within the term "fluid
09:44 19 conduit." It is because of the claim language that allows a
09:44 20 person to add one or more pipe segments between the connection
09:44 21 blocks that allows the adjustability and length. The fluid
09:44 22 conduit is a fluid conduit. It is not inherently adjustable,
09:44 23 and there's nothing in the specification that says so.

09:44 24 THE COURT: Anything else, Mr. Cabello?

09:44 25 MR. CABELLO: Your Honor, again, I think I'm repeating

09:45 1 myself, but clearly the patent teaches adjustment in pivot
09:45 2 joints. And there's a confession of what the prior art is, and
09:45 3 that is seven-inch lines. And the problem to be solved is
09:45 4 adjustment and alignment problems. And that problem is solved
09:45 5 by having an adjustable fluid conduit of some fashion.

09:45 6 THE COURT: Anything else, Ms. Westcott?

09:45 7 MS. WESTCOTT: And it is also solved by having a claim
09:45 8 where you can add multiple pipe sections together to extend the
09:45 9 length of the fluid conduit.

09:45 10 It is -- can also be solved, and is solved additionally in
09:45 11 dependent claims by adding an adjustment joint, for example, in
09:45 12 Claim 11. And I'll note for the Court that other patents that
09:45 13 issued prior to this one but in the same patent family,
09:45 14 prosecuted by the same prosecuting attorney, examined by the
09:45 15 same examiner, include specific claims for a pivot joint. This
09:46 16 one does not.

09:46 17 So when the patentee wanted to claim a pivot joint or when
09:46 18 it wanted to claim an adjustment joint, it did so. And when it
09:46 19 didn't, it didn't.

09:46 20 THE COURT: And it seems to me that to the extent that
09:46 21 Mr. Cabello's right, this is something that you all will have
09:46 22 to just fight out with respect to issues on validity. If they
09:46 23 want to make an argument that prior art would invalidate, and
09:46 24 your way of distinguishing it would be, for example, to pivot
09:46 25 or do something, then we'll figure out at that time if this is

09:46 1 an issue or not, correct?

09:46 2 MS. WESTCOTT: Correct. Correct, Your Honor.

09:46 3 THE COURT: I'll be right back.

09:46 4 (Pause in proceedings.)

09:48 5 THE COURT: So here's what I'm going to do. I realize I
09:48 6 may just be buying myself time and you all effort. It seems to
09:48 7 me that this is an issue that -- I have no idea what -- how
09:48 8 this is going to break when the initial expert claims are
09:48 9 exchanged. I'm going to stick with plain and ordinary meaning.

09:48 10 But in the event that when the plaintiff gets -- I'm
09:49 11 sorry -- when the defendant gets the plaintiff's expert report,
09:49 12 if they feel that the infringement contentions made by the
09:49 13 expert in his report, or when the plaintiff gets the
09:49 14 defendant's validity report, the contentions that are made by
09:49 15 the expert in the validity report fall -- are a position that
09:49 16 is a claim construction position, then you all will just have
09:49 17 to come back to me, and we may -- I'll have to address it. We
09:49 18 may have another mini Markman.

09:49 19 So, Mr. Cabello, if you feel -- what I don't want to
09:49 20 happen, because I just did a little bit in the trial I just had
09:49 21 was, we got to trial and then there was a fight between the
09:49 22 experts of what was meant by "plain and ordinary meaning," even
09:50 23 though there was an agreement as to what plain and ordinary
09:50 24 meaning was on top of that. And yet the experts still said the
09:50 25 other one's plain and ordinary meaning was wrong.

09:50 1 I don't want that fight. That fight is not for the jury,
09:50 2 that's for me. So my admonition to both sides, especially for
09:50 3 plaintiff, I guess, because they'll have the infringement --
09:50 4 first infringement report is, you know, if you take a -- I
09:50 5 don't want to sound threatening. I'm just saying that if the
09:50 6 plaintiff takes the position that the defendants' products
09:50 7 infringe the element of fluid conduit or a single fluid
09:50 8 conduit, if the defendants believe that your expert has taken a
09:50 9 position that is not as a matter of law, the plain and ordinary
09:50 10 meaning or vice versa on validity, which actually may come up
09:51 11 because of what Mr. Henry was saying about how -- you know, how
09:51 12 this was novel over the prior art, then you all need to get
09:51 13 back to me and I need to decide what to do.

09:51 14 And the problem for you all is that if I decide that you
09:51 15 haven't stayed within the scope of plain and ordinary meaning
09:51 16 and your expert has gone beyond that, then that's a bad time to
09:51 17 find that out. So I would use a rule of reason in terms of the
09:51 18 positions you're taking with respect to whether or not the
09:51 19 element -- the fluid conduit and the single fluid conduit
09:51 20 element in the defendants' products infringe or don't infringe.
09:51 21 And if you all feel that the other side isn't -- doesn't have
09:51 22 a -- is not using a methodology that is consistent with what
09:51 23 the plain and ordinary meaning should be, I'll take it up at
09:52 24 that time.

09:52 25 So it's plain and ordinary meaning for both those claim

09:52 1 terms.

09:52 2 The next claim term is "rigid fluid pathway" and "one and
09:52 3 only rigid fluid pathway."

09:52 4 Mr. Henry or Mr. Cabello, which of you is going to start
09:52 5 on that?

09:52 6 MR. HENRY: Your Honor, I'm going to be speaking to the
09:52 7 "one and only," but I don't know if Mr. Cabello wanted to
09:52 8 address the subset of that first. Either way is fine with me.

09:52 9 THE COURT: Mr. Cabello?

09:52 10 MR. CABELLO: I'll yield to Mr. Henry, and then I'll
09:52 11 follow on, Your Honor.

09:52 12 THE COURT: Okay.

09:52 13 MR. HENRY: Thank you, Your Honor.

09:52 14 Well, with the -- or as I've already mentioned, we have,
09:52 15 we believe, in this next element that fatal combination of
09:52 16 consisting and comprising in a single limitation.

09:52 17 Just by way of context to illustrate why this is confusing
09:52 18 and why we just simply cannot determine the outer boundaries,
09:53 19 is if you look at the claim itself, we start with, you know, a
09:53 20 plurality of fluid conduits. Now, there's no distinction
09:53 21 between rigid or not rigid, you know, pipes or hoses, as it
09:53 22 were. We just have a bunch of fluid conduits between a
09:53 23 manifold and the various trees.

09:53 24 Then we go down and we have, further in the claim, where
09:53 25 we have at least one, you know -- again, open-ended, at least

09:53 1 one rigid fluid conduit. And somehow that then translates down
09:53 2 to we're going to end up with one and only one rigid fluid, not
09:53 3 conduit, but pathway. And that's not a defined term. We don't
09:53 4 know exactly what that is.

09:53 5 Now, further, when we talk about the "at least one," you
09:53 6 know, including -- upon including here -- we have "rigid fluid
09:53 7 conduit including." And then it goes down and it talks about a
09:54 8 plurality of pipe joints and connection blocks and then it goes
09:54 9 further, and it's very, very open-ended.

09:54 10 And once again, because of this "one and only one,"
09:54 11 there's an upper limit. We don't know what that upper limit
09:54 12 is. And so once again, we look at possibilities.

09:54 13 You know, our first level of ambiguity has to do with the
09:54 14 phrase itself. Is it that there's several pathways but only
09:54 15 one is rigid? Or is there only one pathway and it's solely
09:54 16 rigid?

09:54 17 And some of these diagrams the left side -- the right side
09:54 18 is prior art. The left side has to do with various
09:54 19 possibilities here. You know, is the one rigid pipe and then
09:54 20 maybe one hose in parallel? Is that, you know, a one and only
09:54 21 rigid fluid pathway, because one of those pathways or conduits
09:54 22 is rigid? Or is it the next one? Is it that there's only one
09:55 23 and it's a pipe, and that's all that this covers?

09:55 24 Or do -- we have on the far right -- and there are other
09:55 25 possibilities as well, but on the far right we have illustrated

09:55 1 two rigid pipes. You know, is that a pathway? It's still
09:55 2 going from the manifold to the tree. It's only going there,
09:55 3 but it's two separate. Is that still one and only? So that's
09:55 4 the first level.

09:55 5 The second level is that again, we have this mini conduit
09:55 6 sitting out there per the claim itself, no distinction between
09:55 7 rigid and non-rigid. It doesn't say where each of those goes.
09:55 8 And then it talks about again somehow those ending up being one
09:55 9 and only one pathway as opposed to conduit.

09:55 10 Now, Ms. Westcott earlier said that, you know, conduit was
09:55 11 well understood and she said we could have, you know, any
09:55 12 number of pipes, for example. Again, open-ended.

09:55 13 It's that one and only one that's so fatal, in our
09:56 14 opinion, to this claim element. We don't know what that one
09:56 15 additional element is where we're no longer within the scope of
09:56 16 that claim.

09:56 17 And then finally we don't really know for sure what rigid
09:56 18 is but when applied to a pathway. We might be able to figure
09:56 19 out what rigid is. I mean, I think we can probably all agree
09:56 20 that's steel pipe. But when applied to this pathway, what does
09:56 21 that pathway include? What does it eliminate? Because we can
09:56 22 only have one. Does it include multiple types of conduits,
09:56 23 rigid and non? We just don't know.

09:56 24 So, Your Honor, we would -- we would suggest that -- well,
09:56 25 you know, the question is what do we add? Because they created

09:56 1 this upper limit. They created the one more thing exceeds the
09:56 2 scope of this claim.

09:56 3 And the public has a right -- you know, our clients have a
09:57 4 right, people in the fracking industry have a right to know
09:57 5 what's that one more thing we can add and not infringe this
09:57 6 claim?

09:57 7 That's the sum of my comments on that point, Your Honor.

09:57 8 THE COURT: Mr. Cabello, is there anything you'd like to
09:57 9 add?

09:57 10 MR. CABELLO: Yes, Your Honor, if I may.

09:57 11 Go to Slide 16 of our presentation. Mr. Zinda will put
09:57 12 this up.

09:57 13 MR. ZINDA: Do you want to wait until they rebut it?

09:57 14 MR. CABELLO: Oh, I'm sorry. Mr. Zinda is suggesting that
09:57 15 I wait for rebuttal to be offered on Mr. Henry's position. I
09:57 16 do have a slightly different position, but I'm not arguing
09:57 17 indefiniteness with respect to this rigid fluid pathway.

09:57 18 THE COURT: Mr. Cabello, why don't you go ahead and argue
09:57 19 whatever you want to say, and Ms. Westcott or whoever on the
09:57 20 other side can take it up. And we'll do it all at once.

09:57 21 MR. CABELLO: Thank you, Your Honor.

09:57 22 What I want to do is go to Slide 16, which is up on the
09:58 23 screen now, Your Honor.

09:58 24 And of course the question -- Cameron offers the plain and
09:58 25 ordinary meaning. Of course we believe that the question that

09:58 1 a person of ordinary skill in the art would understand is,
09:58 2 given the context of this particular invention. And again we'd
09:58 3 cite the Court to the Trustees of Columbia University.

09:58 4 But we have to look at not just the claim. We have to
09:58 5 look at the specification. How do you construe the claim in
09:58 6 light of the specification?

09:58 7 And with that, we can go on to the next slide.

09:58 8 Because you also have to look at what the patentee said
09:58 9 was well known in the art. And that is these large fracturing
09:58 10 lines with the seven-inch bore are difficult to adjust and
09:58 11 align. And so what problem was being solved by the patentee is
09:59 12 adjustability in misalignment problems. They clearly state it
09:59 13 in the specification, and they teach that in all of their
09:59 14 embodiments.

09:59 15 Now, Cameron would like to focus on the claims, and we
09:59 16 certainly have to focus on the claims for both infringement and
09:59 17 construction. But we have to look at the specification to see
09:59 18 what the specification teaches is both the problem and how to
09:59 19 solve that problem.

09:59 20 If we can go to the next slide, Your Honor, which is Slide
09:59 21 18 of our presentation. What we have here on the screen that's
09:59 22 solid -- I'm sorry -- the dotted-red line, if you will, is the
09:59 23 manifold running through the oil field. And then the purple
09:59 24 certainly is the well to be fractured.

09:59 25 But we have elements of adjustability illustrated. We

09:59 1 have rotational adjustability shown by Lines 69, 71 and up at
10:00 2 the top of -- next to the wellhead, 73. So you have this
10:00 3 element of rotational adjustability.

10:00 4 And then we show, and the patent teaches, by lines 68, 70
10:00 5 and 72 is this linear adjustability. And with this both linear
10:00 6 and rotational adjustability, you can compensate or you can
10:00 7 deal with the problems that the patent teaches us exist with
10:00 8 large seven-inch pipelines.

10:00 9 And so again, going on to the next slide, we've shown you
10:00 10 this, Your Honor, which is the linear adjustability, and I
10:00 11 won't spend any time on it.

10:00 12 And if we can then go to Slide 20. The patent
10:00 13 specifically talks about these rotatable pipe joints, 170 as
10:00 14 well. And those are further illustrated in Slide 21. And so
10:01 15 you see in Figure 12 an example of a rotatable pipe joint. You
10:01 16 have the flange at the bottom which can be threaded. They
10:01 17 teach threads and can therefore make up for alignment problems
10:01 18 at the flange joints.

10:01 19 And then you also have this swivel ring, 176, which is at
10:01 20 the top of Figure 12 which can also make up for misalignment
10:01 21 problems with the studded flanges, if you will. So when we
10:01 22 look at the teachings in the patent, there is an ability to
10:01 23 adjust for both linear and misalignment problems at the studded
10:01 24 pipe joints.

10:01 25 And so again, with the Venn diagram on the next slide, on

10:01 1 Slide 22, you'll see that the asserted claims, Claims 1, 10,
10:01 2 14, 17 and 20, we contend include some element of
10:02 3 adjustability, and that is a rotational adjustment and a
10:02 4 lengthwise adjustment. And so with the subsets that are shown
10:02 5 in this Venn diagram you see the lengthwise adjustment in Claim
10:02 6 5 and you see the rotational adjustment in Claims 6, 9, 16 and
10:02 7 19.

10:02 8 And so again, Your Honor, I know I'm repeating myself and
10:02 9 I apologize for that, but we have to look at the specification
10:02 10 to see what the problem is to be solved and how the patentee
10:02 11 taught us how to solve that problem. And we think that just
10:02 12 focusing strictly on the claims and the words of the claims in
10:02 13 a vacuum without opening the specification is improper. And
10:02 14 again we rely on the Trustees of Columbia University.

10:02 15 And with that, Your Honor, I'll stop.

10:02 16 THE COURT: Mr. Cabello, would you put that slide back up
10:02 17 for just a second?

10:03 18 MR. CABELLO: The Venn diagram, Your Honor?

10:03 19 THE COURT: Yes, sir, please.

10:03 20 MR. CABELLO: Yes, Your Honor.

10:03 21 THE COURT: Okay. Thank you.

10:03 22 I will be -- oops. I'm having difficulties today. I'll
10:03 23 be right back.

10:03 24 MR. CABELLO: All right. Thank you, Your Honor.

10:03 25 (Pause in proceedings.)

10:03 1 THE COURT: Okay. Thank you for keeping up --

10:04 2 Ms. Westcott, if you don't need that, then I can have -- you
10:04 3 brought slides.

10:04 4 If you want to take that down, Mr. Cabello, or whoever on
10:04 5 your side, and Ms. Westcott can take the screen.

10:05 6 MR. KEVILLE: Your Honor, this is John Keville for
10:05 7 Cameron. I'm going to turn it over to William Logan now.

10:05 8 And just by way of introduction, Mr. Logan is a fairly
10:05 9 junior associate. While I can easily make the argument he's
10:05 10 smarter than me, he's a 2017 grad from the law school at the
10:05 11 University of Alabama. And so to the extent, you know, I need
10:05 12 to join in, I will. I trust that he won't have any problem,
10:05 13 and I hope Your Honor will give him a little leeway if
10:05 14 necessary, as a junior associate.

10:05 15 THE COURT: Well, I'm usually pretty brutal on everyone.
10:05 16 And so -- no. Mr. Keville, I made a pretty good living for
10:05 17 20 years by never hiring an associate that wasn't smarter than
10:05 18 I was.

10:05 19 (Laughter.)

10:05 20 MR. KEVILLE: My practice as well.

10:05 21 THE COURT: I would think less of you if you didn't do
10:05 22 that.

10:05 23 So, Mr. Logan, I look forward to hearing from you.

10:06 24 MR. LOGAN: Thank you, Your Honor, and I appreciate the
10:06 25 opportunity to address the term.

10:06 1 I want to begin -- and I'll share my screen here. I want
10:06 2 to begin actually where the Court left off with Mr. Cabello
10:06 3 just to set up this argument, which is this Venn diagram.
10:06 4 Because really it sort of encapsulates Cameron's argument on
10:06 5 this term which is these independent claims, the broader claims
10:06 6 that don't have these in them. They have a wide swath in this
10:06 7 Venn diagram, all this white area here that's outside the
10:06 8 rotational adjustment, the lengthwise adjustment. And
10:06 9 Cameron's position is that those independent claims, they claim
10:06 10 territory within this white space that's not within this red
10:06 11 circle or within this green circle.

10:06 12 THE COURT: Mr. Logan, let me interrupt you and tell you
10:06 13 my worry now is that I didn't do a good job of muting my screen
10:06 14 because when I went on mute, that was exactly the discussion I
10:07 15 had with my law clerk.

10:07 16 So I think Mr. Keville is right, that he did well by
10:07 17 having you make this argument. That was exactly what struck me
10:07 18 about the Venn diagram.

10:07 19 MR. LOGAN: Thank you, Your Honor.

10:07 20 Yeah. So I think it gives us an intuitive place to start
10:07 21 with this argument. And, you know, obviously we have two
10:07 22 separate issues to address. One is Butch's arguments that this
10:07 23 term is indefinite. And then after that, Nitro's argument is,
10:07 24 well, this term actually we need to read in these adjustment
10:07 25 joints and swivel joints to the term.

10:07 1 And we agree with the Court obviously, Your Honor, as we
10:07 2 propose that this term has a plain and ordinary meaning.

10:07 3 THE COURT: Mr. Logan?

10:07 4 MR. LOGAN: Yes, Your Honor.

10:07 5 THE COURT: And, Mr. Logan, you haven't raised this yet,
10:07 6 but you may be getting there. It usually occurs to me that --
10:07 7 well, Mr. Henry and Mr. Cabello may have a problem that they're
10:08 8 together on this. And what I mean by that is, it's difficult
10:08 9 for one defendant to be arguing that something is indefinite
10:08 10 and another defendant to be saying it's not indefinite, it
10:08 11 means this. It usually is not great for the argument that
10:08 12 something is indefinite when Mr. Cabello can so passionately
10:08 13 argue that it is not indefinite but that I have a specific
10:08 14 meaning I have to give.

10:08 15 So you may be fortunate that you have two defendants who
10:08 16 are taking essentially the opposite position on this.

10:08 17 MR. LOGAN: Yes, Your Honor. And this time I want to say
10:08 18 I believe the Court may have been peeking ahead in my slides.
10:08 19 I skipped a few steps ahead here, because I do think that
10:08 20 intuitively it is important to point out.

10:08 21 And I do want step back for just a second on
10:08 22 indefiniteness to, you know, remind the Court that
10:08 23 indefiniteness is a high standard. It's an invalidity
10:08 24 standard. So it's something that has to be proven by clear and
10:09 25 convincing evidence. And in this case of course Cameron had

10:09 1 its expert -- as I'll walk through in just a minute -- that
10:09 2 went through the claims, the patent, the prior art, and talked
10:09 3 about this term and came to the conclusion that it was
10:09 4 understood with reasonable certainty.

10:09 5 The only other expert in this case is Nitro's expert.
10:09 6 Butch's did not offer an expert to support its position.
10:09 7 Nitro's expert looked at these same claim terms, at these same
10:09 8 prior art references, and, as this slide shows, came to the
10:09 9 conclusion that a POSITA would understand this term, and in
10:09 10 fact would understand it to provide one and only one route for
10:09 11 fluid to flow from the manifold to the respective fracturing
10:09 12 tree.

10:09 13 So in this case, Your Honor -- or in these two cases, I
10:09 14 should say, we only have two experts. And both of those
10:09 15 experts have looked at these materials, looked at the patent,
10:09 16 and both of them has reached the conclusion that they
10:09 17 understand this term with reasonable certainty.

10:09 18 So to that extent I do believe that, you know, at least
10:10 19 probative of that clear and convincing standard, that aside
10:10 20 from the, you know, attorney argument, Butch's doesn't have
10:10 21 anything to buoy its position here.

10:10 22 And, you know, stepping back to how Dr. Wooley reached
10:10 23 that conclusion, because I do think that's important. It's not
10:10 24 just that Dr. Wooley gave his opinion in a conclusory fashion.
10:10 25 In Dr. Wooley's declaration, he walks through prior art, he

10:10 1 walks through the claims, he's walked through the
10:10 2 specification.

10:10 3 And here's what he's found and what he's explained from
10:10 4 doing that. In the prior art and, you know, to their credit
10:10 5 Nitro of course takes umbrage with this and disagrees, but as
10:10 6 the Court noted, that's an issue for invalidity.

10:10 7 But I don't believe Nitro disagrees with the proposition
10:10 8 that in the prior art there were frac iron setups, which are
10:10 9 multiple fluid line setups that go from the fracturing manifold
10:10 10 to the fracturing tree. From this a POSITA would understand
10:11 11 that those give multiple fluid pathways between the fracturing
10:11 12 manifold and the fracturing tree.

10:11 13 So this is important background knowledge that Dr. Wooley
10:11 14 explained a POSITA would have. A POSITA would have this
10:11 15 preexisting knowledge about these multiple pathway setups using
10:11 16 prior art frac iron.

10:11 17 And, you know, importantly when we get to the
10:11 18 indefiniteness question, a lot of the argument that Mr. Henry
10:11 19 raises when he discussed this term were about, well, how do we
10:11 20 know what that means? And Mr. Henry actually, I believe, said
10:11 21 it himself when he looked at one of his embodiments that he was
10:11 22 proposing, and he said, well, is this one fluid pathway? It
10:11 23 has two separate pathways.

10:11 24 And I think that sort of answers the question. If you
10:11 25 look at it and there's multiple pathways to the tree, then it's

10:11 1 not one fluid pathway to the tree. That doesn't mean that this
10:11 2 is a part that Mr. Henry said was confusing about the term,
10:12 3 that the pathway can't be made up of multiple segments of fluid
10:12 4 conduit.

10:12 5 And again, this is background knowledge that a POSITA
10:12 6 would have from the prior art. Those prior art frac iron
10:12 7 systems, their runs of pipe in each of those fluid pathways
10:12 8 were made up of various segments of pipe joints connected by
10:12 9 hammer unions.

10:12 10 So this is something that would be very familiar to a
10:12 11 POSITA, and that's how Dr. Wooley explains it. It would not be
10:12 12 confusing to a POSITA to understand that each fluid pathway to
10:12 13 a tree, or in this case the one and only one fluid pathway to a
10:12 14 tree, might be made up of multiple pipe sections connected in
10:12 15 series.

10:12 16 So with that background, Your Honor, Dr. Wooley also
10:12 17 looked at the figures and the specification. And the figures
10:12 18 are very consistent with this. And the figures also describe
10:12 19 this fluid pathway, you know, very clearly in their images.
10:13 20 Here, for instance, you know, similar to what's claimed in
10:13 21 Claim 1, we have one and only one rigid fluid pathway between
10:13 22 that fracturing tree, 20, which is red, and the fracturing
10:13 23 manifold which begins at the outlet branch there with those two
10:13 24 valves in series.

10:13 25 So a POSITA looking at this would reaffirm, would

10:13 1 understand again, from his knowledge in the art, that what
10:13 2 these claims are talking about is that one and only one rigid
10:13 3 fluid pathway differentiating it from those prior art systems.
10:13 4 And in fact, that's exactly what Dr. Wooley opines on this
10:13 5 slide when he says, this is as opposed to the multiple lines of
10:13 6 prior art frac iron that provide multiple fluid pathways.

10:13 7 And this isn't limited to just the figures, and this isn't
10:13 8 limited to just snippets from the -- you know, the
10:13 9 specification that explain the one and only one rigid fluid
10:13 10 pathway concept. It was also something that came up during
10:14 11 prosecution. You know, originally claims were rejected for
10:14 12 double patenting over the '195 patent. And there the examiner
10:14 13 said, well, you know, this essentially seems to be double
10:14 14 patenting because the '195 already handles the case where you
10:14 15 have fracturing trees coupled to the manifold by only one rigid
10:14 16 fluid conduit, providing that one and only one rigid fluid
10:14 17 pathway.

10:14 18 And, importantly, the way that the patentee came around
10:14 19 that was adding these specific arrangements of pipe joints,
10:14 20 connection blocks with the flange connections that ultimately
10:14 21 appear in the issued claim.

10:14 22 So again, there was no confusion at the Patent Office.
10:14 23 There's no confusion in the figures. There's no confusion with
10:14 24 the experts who have opined in this case about what this term
10:14 25 means with reasonable certainty.

10:14 1 And, you know, as Your Honor intuited earlier and we
10:14 2 already discussed in looking at this slide then, there doesn't
10:14 3 really seem to be any dispute between the parties. Because
10:14 4 Butch's says it can understand with reasonable certainty, it
10:15 5 says here's a better way potentially that the patentee could
10:15 6 have drafted this curve to get the same thing across. And
10:15 7 again, Nitro's expert reached his own conclusion that a POSITA
10:15 8 would understand this term.

10:15 9 So, Your Honor, unless there's any specific questions on
10:15 10 indefiniteness, I can also address Nitro's arguments about
10:15 11 reading in the adjustability limitation.

10:15 12 THE COURT: And I don't want to take -- I know you'd like
10:15 13 to speak. Are they much different than the arguments that were
10:15 14 made to the prior claim term? What I would say -- let me say
10:15 15 it this way. If there's anything you'd like to add to what was
10:15 16 said earlier about why it would be inappropriate for fluid
10:15 17 conduit, you're certainly welcome to.

10:15 18 MR. LOGAN: Yes, Your Honor. And I will do my best here
10:15 19 not to be repetitive. And Ms. Merritt has already handled much
10:15 20 better -- Ms. Westcott has already handled much better than I
10:15 21 could, you know, all of the basic background there.

10:15 22 What I would like to point out is that, you know, the
10:16 23 claim differentiation principle is even stronger, really, in
10:16 24 the '645. Because here you have both of the terms that Nitro
10:16 25 wants to read into the claim. And this is presented on our

10:16 1 Slide 22. Both those terms appear in the dependent claim. So
10:16 2 the adjustment joint's in Claim 6, the swivel's in Claim 9.
10:16 3 Nitro's position has been that's okay, because we're reading
10:16 4 them both in.

10:16 5 And, Your Honor, Nitro hasn't cited any cases for that
10:16 6 proposition, but it seems not very intuitive that claim
10:16 7 differentiation doesn't apply the more independent claims that
10:16 8 you read in. So that's one difference that I would like to
10:16 9 note for the Court.

10:16 10 The other difference is in the specification. Nitro has
10:16 11 consistently said that there are no embodiments disclosed that
10:16 12 don't have these adjustment joints and pivot joints in them.
10:16 13 But importantly in describing Figure 10, the patentee went to
10:17 14 lengths to distinguish that from other potential embodiments.
10:17 15 In fact, in this highlighted section the patentee said, as
10:17 16 presently illustrated, Figure 10 has those rotatable
10:17 17 components.

10:17 18 But you could have one with less degrees of freedom. And
10:17 19 it goes on to say, in fact, in some instances you can have some
10:17 20 where you just basically can rotate these pipes and these
10:17 21 connection blocks into position before you bolt them together.

10:17 22 So, Your Honor, sort of the intuition there is, as an
10:17 23 example, to give the example studded connection, you can rotate
10:17 24 that -- you know, that connection block along those studded
10:17 25 connections before you bolt it in place, and that lets you kind

10:17 1 of turn the pipe joints to the position that you want them,
10:17 2 which gives you some ability for linear or for vertical or
10:17 3 horizontal adjustment. So those embodiments are described and
10:17 4 discussed in the specification.

10:17 5 The last point that I would like to make is just to
10:17 6 distinguish a little bit Columbia. In discussing Columbia,
10:18 7 they put it up on their initial slide, Nitro says that --
10:18 8 Columbia says, no. To depart from the plain and ordinary
10:18 9 meaning, you don't need a definition. You don't need a
10:18 10 disavowal of claim scope.

10:18 11 I don't believe that's quite right, Your Honor. Columbia
10:18 12 dealt with a very specific question which was, do you need an
10:18 13 express definition? Or do you need an express disavowal of a
10:18 14 claim scope? In other words, do you need to put that in the
10:18 15 terms of I define X term to mean Y thing?

10:18 16 The Columbia case, you know, wasn't an en banc decision
10:18 17 that was overruling Thorner. And I think that's important to
10:18 18 point out because, as this Court has noted before in its
10:18 19 opinions like True Chemical, Thorner stands for the proposition
10:18 20 that you've got to give weight to the plain and ordinary
10:18 21 meaning of a term.

10:18 22 And unless you're finding those clear definitions or clear
10:18 23 disavowals of claim scope, terms should be given their plain
10:18 24 and ordinary meaning. That harkens all the way back to
10:18 25 Phillips. And that's sort of one of those standard principles

10:19 1 of claim construction.

10:19 2 So, Your Honor, with that said, I cede my time and I
10:19 3 greatly appreciate the opportunity to argue today.

10:19 4 THE COURT: Well, I had a wonderful trial lawyer in my
10:19 5 court this week who was from Alabama, and I always enjoy
10:19 6 hearing folks talk that don't have an accent. So I appreciate
10:19 7 your time this morning.

10:19 8 MR. LOGAN: Thank you, Your Honor.

10:19 9 THE COURT: Mr. Henry or Mr. Cabello, if you'd like to
10:19 10 respond.

10:19 11 MR. HENRY: Yes, Your Honor. David Henry for Butch's.

10:19 12 It's been pointed out that there were two experts in the
10:19 13 case, and great emphasis has been given on that, as well as the
10:19 14 fact that Butch's did not employ an expert. I'm certainly sure
10:19 15 we could have, but then we would only compound the issue here.

10:19 16 It's notable that, you know, if experts could so readily
10:19 17 divine the meaning of this term, they would have come up with
10:19 18 the same construction. But in this case they didn't, which in
10:20 19 our opinion underscores the indefiniteness of this.

10:20 20 I would point out too that Nautilus and its progeny
10:20 21 certainly do not give primacy to expert testimony. What do
10:20 22 they talk about over and over again? They talk about the claim
10:20 23 language, the specification, the prosecution history. That is
10:20 24 what we've relied on, Your Honor.

10:20 25 And in this case, given indefiniteness, the lack of

10:20 1 guidance as to what is enough and what is too much to satisfy
10:20 2 that element. And in terms again of primacy, Mr. Logan
10:20 3 referenced Phillips. Well, again, what does Phillips tell us?
10:20 4 That one of the last resorts would be extrinsic evidence.

10:20 5 So, Your Honor, we rely on the evidence that all the case
10:20 6 law says is the prime evidence here, the intrinsic record. And
10:20 7 there's just not enough guidance there to tell us what does and
10:20 8 doesn't satisfy these elements.

10:20 9 That's the gist of my comments.

10:21 10 THE COURT: Mr. Cabello?

10:21 11 MR. CABELLO: Thank you, Your Honor.

10:21 12 First of all, I want to start out with the Venn diagram.
10:21 13 And I will tell the Court that at least we didn't overhear
10:21 14 anything that the Court might have said about the Venn.

10:21 15 (Laughter.)

10:21 16 MR. CABELLO: But I do want to focus on that, because the
10:21 17 Venn diagram was not intended to be all inclusive of the claim.
10:21 18 And that's why there's a lot of white space. I mean, if we go
10:21 19 and we look at the claim, there's a lot of other limitations
10:21 20 set out in the claim. And those are in the white space.

10:21 21 What we wanted to focus on was these rotational and
10:21 22 adjustment -- or the lengthwise adjustment that are, we
10:21 23 believe, inherent in the claim and inherent in the
10:21 24 specification.

10:21 25 If I can go to Slide -- well, first of all, with respect

10:21 1 to the slides that Mr. Logan used with respect to Nitro's
10:21 2 expert, I will merely tell the Court that our expert was not
10:21 3 opining on the one and only one. It had to do with something
10:22 4 else. And so the issue was not directly in front of him. And
10:22 5 I recognized by the Court's comments that the issue with
10:22 6 respect to the differences in the positions taken by Butch and
10:22 7 Nitro are understandable.

10:22 8 If we can go to Slide 23 used by Cameron.

10:22 9 I wanted to point out, because I think it's critical here,
10:22 10 Mr. Logan focused on the three rotational degrees of freedom,
10:22 11 and then it goes on and talks about how it can be rotated to a
10:22 12 desired position.

10:22 13 What is key here, Your Honor, is that nowhere does this
10:22 14 patent teach no degrees of freedom. And that's what Cameron's
10:22 15 position is, is that there can be piping configurations that
10:22 16 have no degrees of freedom. The patent clearly teaches that in
10:23 17 some cases there can be three degrees of freedom. And
10:23 18 certainly this excerpt that's used by Mr. Logan teaches at
10:23 19 least one degree of freedom.

10:23 20 If I can go to Slide 31.

10:23 21 Mr. Logan did not focus on this, Your Honor, but I wanted
10:23 22 to call the Court's attention to this particular slide. You'll
10:23 23 notice in green at the bottom of the slide, bottom left-hand
10:23 24 corner of the slide, there are some valves placed in this green
10:23 25 line.

10:23 1 And, you know, valves are basically on and off. And so
10:23 2 you see these valves appear to be three-way valves. And valves
10:23 3 don't just don't direct fluid, and certainly they're not taught
10:23 4 to direct fluid. And at least this particular embodiment, or
10:23 5 at least the way it was doctored up by Cameron, which suggests
10:23 6 that you can direct fluid either down the paper or into the
10:24 7 wellhead. And that's just not the case with valves, Your
10:24 8 Honor.

10:24 9 And so I know that Mr. Logan didn't focus on this
10:24 10 particular slide, but it is in their pack and so I wanted to
10:24 11 call that out with respect to this particular slide.

10:24 12 Mr. Logan talked about express disclaimers. You know,
10:24 13 we've said enough. I mean, there's certainly no express
10:24 14 limitations in the patent. But again, we believe that the
10:24 15 Trustees of Columbia University case teaches us that there
10:24 16 doesn't have to be an express disclaimer and certainly that we
10:24 17 have to focus on the embodiments that are disclosed in the
10:24 18 specification in interpreting the claims. So we can't strictly
10:24 19 look at the claims.

10:24 20 I think with that, Your Honor, I'm getting repetitive, and
10:24 21 so I'll stop.

10:25 22 THE COURT: Mr. Logan, anything you'd like to add?

10:25 23 MR. LOGAN: Yes, Your Honor. Very briefly just a few
10:25 24 things I would lake to touch on.

10:25 25 To begin with, as Mr. Henry said, Nautilus is the case

10:25 1 that controls when it comes to indefiniteness. And certainly
10:25 2 the claim terms and specification, those things are important.

10:25 3 But what Mr. Henry misses is that the Nautilus standard is
10:25 4 based on whether a POSITA would understand the term with
10:25 5 reasonable certainty. And that's where the clear and
10:25 6 convincing evidence standard comes in, because as Nautilus
10:25 7 makes clear, it's not whether an attorney understands the terms
10:25 8 or whether a layperson understands the term with reasonable
10:25 9 certainty. It's whether a POSITA does. And in that sense I do
10:25 10 believe that the extrinsic evidence of how a POSITA understands
10:25 11 the term is probative and does go towards that clear and
10:25 12 convincing burden.

10:25 13 Setting that aside, Mr. Cabello says that the figure that
10:25 14 I showed, or the slide that I showed on 23 which had the
10:26 15 description of it of Figure 10 that talked about the different
10:26 16 embodiments you could have that could differ from Figure 10, he
10:26 17 said it certainly doesn't show any that don't have, you know,
10:26 18 less than one degree of freedom.

10:26 19 But there's nothing in that passage that supports what he
10:26 20 just said. There's nothing in there that says it must have at
10:26 21 least one degree of freedom. Those words don't exist in that
10:26 22 passage. So certainly it can't be read into the passage simply
10:26 23 because it suits Nitro's arguments here.

10:26 24 Also as to the figure that Nitro showed on Slide 31,
10:26 25 frankly, Your Honor, I'm not sure what the relevance is about

10:26 1 the valves to this particular term in that figure. But I will
10:26 2 note for the Court, because I don't want to go unresponded to,
10:26 3 that certainly multiport valves are known in the art. There
10:26 4 are three-way valves known in the art. And that is something
10:26 5 that I'm sure the Court can take notice of if it would like to.

10:26 6 But, Your Honor, with those statements made, that's all I
10:27 7 have for argument on this term.

10:27 8 THE COURT: Okay. I'll be back in just a second.

10:27 9 (Pause in proceedings.)

10:29 10 THE COURT: We're back on the record.

10:29 11 Mr. Logan, you should be very happy. Despite being up
10:29 12 against two very articulate and skilled lawyers, you win. I'm
10:29 13 going to maintain construction for both "rigid fluid pathway"
10:29 14 and for "one and only one rigid fluid pathway" of plain and
10:30 15 ordinary meaning.

10:30 16 The next issue is outlet branches, which my understanding
10:30 17 is only with respect to one of the parties. If they would like
10:30 18 to take up -- give me one second to get there on my -- here we
10:30 19 go.

10:30 20 I guess on this one it'd be well to start with the
10:30 21 plaintiff. The Court's construction -- preliminary
10:30 22 construction currently is that the claim term "outlet branches"
10:30 23 is indefinite.

10:30 24 MR. KEVILLE: Thank you, Your Honor. John Keville for
10:30 25 Cameron. I'll take this one.

10:30 1 THE COURT: Okay.

10:30 2 MR. KEVILLE: So, Your Honor, we've proposed, in view of
10:30 3 your preliminary construction, two alternative clarifying
10:30 4 constructions. And I will note we e-mailed those to Mr. Henry
10:31 5 and Butch's this morning at around 8 o'clock. I haven't heard
10:31 6 any response, so I assume they're not in agreement and maybe
10:31 7 they'll tell me differently.

10:31 8 But why do we offer these? Well, when Your Honor came
10:31 9 back with indefiniteness, we looked back at our plain and
10:31 10 ordinary meaning which is, "extensions from the shared trunk
10:31 11 line," and saw that the bulk of the briefing by Butch's really
10:31 12 went to they could not tell what the boundaries of the outlet
10:31 13 branches were. And by saying "extensions from the shared trunk
10:31 14 line," we didn't quite clarify the boundaries.

10:31 15 So what we've proposed as alternative constructions is
10:31 16 extensions originating from the shared trunk conduit and
10:31 17 extending to the rigid fluid conduits. Or, alternatively,
10:31 18 outlets beginning at the shared trunk line and ending at the
10:31 19 rigid fluid conduits. They're intended to say the same thing
10:31 20 but to address the complaint that was the vast majority of
10:32 21 Butch's, which said there was no clarity to where an outlet
10:32 22 branch begins and ends. And the boundaries between a manifold
10:32 23 and conduit for purposes of identifying the outlet branch
10:32 24 remain unclear. And that was in their opening brief at
10:32 25 Pages 16 and 17.

10:32 1 So with apologies for any confusion, we think these new
10:32 2 proposed constructions will provide certainty in the structure
10:32 3 and the boundaries of the term "outlet branches" in full accord
10:32 4 with the specification and the claims, as I'll show when we go
10:32 5 forward.

10:32 6 If we go to the next slide.

10:32 7 If you look at the abstract, Your Honor, it talks about
10:32 8 the fracturing system and then it says in one embodiment, "the
10:32 9 fracturing system includes a fracturing manifold for routing
10:32 10 fracturing fluid to multiple wells." So you start at the
10:32 11 manifold. And then it says, "The fracturing manifold can be
10:32 12 coupled via fluid conduit to fracturing trees."

10:33 13 So that provides you a path. You go from the manifold to
10:33 14 the fluid conduits and to the fracturing trees.

10:33 15 And then in the highlighted language it explains what the
10:33 16 manifold is. "The fracturing manifold can include a trunk line
10:33 17 that provides fracturing fluid to multiple outlet branches."
10:33 18 So now you have the manifold has a trunk line and that provides
10:33 19 to multiple outlet branches which can include valves. And then
10:33 20 we know that we go from the outlet branches to the fluid
10:33 21 conduits, because that's what the earlier sentence said. "The
10:33 22 fracturing manifold can be coupled via fluid conduits to the
10:33 23 fracturing trees." So that explains the outlet branches. They
10:33 24 begin at the trunk line and they end at the outlet branches.

10:33 25 And that's consistent with the claim language, if we look

10:33 1 at the next slide.

10:33 2 So if you look at Claim 2, Claim 2 says "outlet branches
10:34 3 for routing fracturing fluid from the shared trunk conduit to
10:34 4 the individual fracturing trees." But if you have to read that
10:34 5 in conjunction with Claim 1 which we looked at in-depth, which
10:34 6 said, wherein each fracturing tree is coupled to the fracturing
10:34 7 manifold by at least one fluid conduit.

10:34 8 So now we see that the manifold in Claim 2 includes a
10:34 9 trunk line and the outlet branches. So again, this is clear
10:34 10 you begin at the trunk line. You go to the outlet branches,
10:34 11 and those -- and that the -- at least one rigid fluid conduit.

10:34 12 And Claim 18 might be one of the ones that makes it most
10:34 13 clear. If you look at Claim 18 in whole, it says the method of
10:34 14 Claim 17 wherein the fracturing manifold -- assembling the
10:34 15 fracturing manifold includes assembling the fracturing manifold
10:34 16 so as to include outlet branches having valves for controlling
10:35 17 flow of fracturing fluid from the trunk line -- so it's telling
10:35 18 you again the outlet branches start at the trunk line -- to the
10:35 19 multiple outlets and routing fracturing fluid from the
10:35 20 fracturing manifold to the multiple wells through the rigid
10:35 21 conduits includes operating the valves of the outlet branches
10:35 22 through the rigid conduits.

10:35 23 So again, Claim 18 makes it very clear you have the
10:35 24 manifold. It includes outlet branches. You start at the trunk
10:35 25 line, you go through the outlet branches then through rigid

10:35 1 conduits to get to the trees.

10:35 2 And I will note that there was no argument on Claim 18
10:35 3 that they couldn't understand the structure and where it ends.
10:35 4 There were actually three different indefiniteness arguments.
10:35 5 And so for Claim 18 there was no argument that they couldn't
10:35 6 understand where the outlet begins and ends. They just said it
10:35 7 was uncertain as to the number of valves.

10:35 8 And the outlet branches having valves is not uncertain.
10:36 9 There's no requirement that any claims say each outlet branch
10:36 10 having one valve or each outlet branch having two valves.
10:36 11 Those are possible embodiments. But in their own briefing they
10:36 12 didn't argue that for Claim 18 that they couldn't tell with
10:36 13 reasonable certainty what's the structure and where does the
10:36 14 structure begin and end.

10:36 15 You can see in the specification it says, in some
10:36 16 instances a fracturing manifold includes a trunk line for
10:36 17 providing fracturing fluid to multiple outlet branches of the
10:36 18 manifold. So again, the structure is clear. It tells you
10:36 19 where it starts.

10:36 20 And then we can go through the embodiments, and we can see
10:36 21 how some of this plays out. So this is drawn, Your Honor, this
10:36 22 is Figure 10 from the patent. And Figure 10, as drawn, shows
10:36 23 the exemplary claim for embodiment. And it requires a first
10:37 24 outlet branch having two valves connected in series and a
10:37 25 second outlet branch having two valves connected in series.

10:37 1 Very clearly shows you the green is the shared trunk conduit.
10:37 2 What's shown in purple are the outlet branches. Those together
10:37 3 make up the fracturing manifold. And then what's shown in blue
10:37 4 is the rigid fluid conduit that takes the fluid the rest of the
10:37 5 way to the fracturing trees. And this is essentially the same
10:37 6 structure as Claim 10 which requires a first and second pair of
10:37 7 valves.

10:37 8 Then what we've drawn in the next slide, Your Honor, is
10:37 9 we've shown a modified version of Figure 10 to show the
10:37 10 exemplary Claim 3 embodiment. Claim 3 is broader than Claim 4.
10:37 11 It can include the pair of valves in series, or it can include
10:37 12 this embodiment.

10:37 13 So in this embodiment we have the same structure. The
10:37 14 shared trunk conduit is shown in green. The outlet branches
10:38 15 are shown in purple. But here there's only one valve. So this
10:38 16 is an alternative embodiment where the outlet branches of the
10:38 17 fracturing manifold include valves. So there's very clear
10:38 18 that's another embodiment.

10:38 19 And then if we get to the next slide, this is again
10:38 20 broader than 3 or 4. This is broad enough to capture the Claim
10:38 21 3 and 4 embodiments which are all just possible embodiments of
10:38 22 the invention, but also this embodiment where the outlet
10:38 23 branches for routing fracturing fluid from the shared trunk
10:38 24 conduit to individual fracturing trees. In this instance we're
10:38 25 showing an embodiment that doesn't have valves.

10:38 1 So this again would be another embodiment showing that you
10:38 2 have valves this time in the shared trunk conduit, and the
10:38 3 outlet branches are shown connecting to the rigid fluid
10:38 4 conduit. Again, beginning at the shared trunk conduit and
10:38 5 ending at the rigid fluid conduit.

10:39 6 Another place that would show a POSITA would understand
10:39 7 where the outlet branches begin and end is this part of the
10:39 8 specification. The specification says, "The fracturing
10:39 9 manifold, 22, is mounted on at least one skid, 24." So I've
10:39 10 shown in yellow skid 24.

10:39 11 Now, the claims do not include the skid. The skid is not
10:39 12 claimed. But the specification makes clear that the fracturing
10:39 13 manifold, which is the trunk line and the outlet branches, is
10:39 14 what is shown on skid 24. So again, it's the green shared
10:39 15 trunk conduit and the purple outlet branches.

10:39 16 While this is not to be read into the claims, a POSITA
10:39 17 would be reading the specification, would look to the
10:39 18 specification for guidance if indeed the POSITA didn't --
10:39 19 wanted more clarity on where the outlet branches ended, and
10:39 20 would see, okay. I see from Figure 10 that they end at the
10:39 21 purple valves which are the outlet branches.

10:40 22 And I would note, Your Honor, just in this case, although
10:40 23 Mr. Cabello did not provide an expert opinion, there was no
10:40 24 claim by Nitro that this claim term could not be understood.
10:40 25 And so in this case where they have the high burden of clear

10:40 1 and convincing evidence on indefiniteness, we have a POSITA who
10:40 2 provided declaration evidence on behalf of Cameron that said, I
10:40 3 understand what outlet branches mean. We have Nitro who has
10:40 4 made no argument. They can't understand what outlet branches
10:40 5 mean. And then we have Mr. Henry and attorney argument only on
10:40 6 behalf of Butch's that says, we can't understand what outlet
10:40 7 branches mean.

10:40 8 And we think with the alternative construction it's very
10:40 9 easy. It resolves all the issues they raised. It shows
10:40 10 exactly where the outlet branches begin and end.

10:40 11 The other thing that we look at to understand why outlet
10:40 12 branches is not indefiniteness is the Patent Office. The
10:41 13 Patent Office understood what outlet branches are. This is
10:41 14 from the office action where the examiner was talking about the
10:41 15 Kajaria reference. And in there the examiner said, "Kajaria
10:41 16 discloses...the fracturing fluid distribution manifold
10:41 17 including a trunk line (Fig. 3A #60) and multiple outlet
10:41 18 branches (Fig. 3A No. 44A and No. 44C)."

10:41 19 So we also have evidence in this case, Your Honor, that
10:41 20 the Patent Office understood not only what outlet branches
10:41 21 meant in terms of this patent, but understood those to be terms
10:41 22 that it could easily find in the prior art.

10:41 23 Other prior art also uses the terms "outlet branches."
10:41 24 This is the Childress patent which is in the file history. And
10:41 25 at the abstract it says there are a number of outlet branches

10:41 1 that have corresponding outlet branches to each tree.

10:41 2 So "outlet branches" is an easily understood term both to
10:41 3 a POSITA in our case, both to Nitro and to the patent examiner
10:42 4 and to other POSITAs who wrote and invented the prior art.
10:42 5 Again, Childress talks about a number of outlet branches in the
10:42 6 specification as well.

10:42 7 And then so I would end, Your Honor, with Butch's not
10:42 8 meeting its high burden here, because Dr. Wooley, a POSITA on
10:42 9 behalf of Cameron, said it's not indefinite. A POSITA would
10:42 10 understand this with reasonable certainty. Butch's provided no
10:42 11 evidence to meet its clear and convincing standard. And this
10:42 12 is exactly what was rejected in the Whirlpool case from the
10:42 13 Eastern District of Texas 2016 where the Court said, instead of
10:42 14 submitting evidence such as an expert declaration to
10:42 15 demonstrate the understanding of a person of ordinary skill in
10:42 16 the art, Yunda relies entirely on attorney argument based on
10:43 17 the patent's intrinsic evidence. The Court finds such argument
10:43 18 unpersuasive.

10:43 19 So I understand Your Honor preliminarily found it
10:43 20 persuasive. I think they have not met their high -- you know,
10:43 21 their high burden of clear and convincing evidence. I think
10:43 22 there's overwhelming evidence the other way. But I think to
10:43 23 the extent there remained any ambiguity -- if you would go to
10:43 24 the next slide -- the clarifying constructions that we provided
10:43 25 easily resolve any ambiguity.

10:43 1 Whichever way you do it, if you substitute for outlet
10:43 2 branches, either extensions originating from the shared trunk
10:43 3 conduit and extending to the rigid fluid conduits, or you use
10:43 4 outlet branches beginning at the shared trunk conduit and
10:43 5 ending at the rigid fluid conduits, it's just a different kind
10:43 6 of way of saying the same thing. But I think it completely
10:43 7 resolves any ambiguity that Butch's has. Obviously Nitro has
10:43 8 no ambiguity. And we would propose that one of these
10:43 9 clarifying constructions would resolve the issues that they
10:44 10 raised and address Your Honor's preliminary construction as
10:44 11 indefinite.

10:44 12 And with that, if Your Honor has any questions, I'm happy
10:44 13 to answer.

10:44 14 THE COURT: That was a nice job.

10:44 15 I'll hear from defendant.

10:44 16 MR. HENRY: Your Honor, with respect to the proposed
10:44 17 clarifying constructions, we simply haven't had time
10:44 18 sufficiently to assess that. But with respect to responding
10:44 19 specifically to Cameron's arguments, Mr. David DeZern of our
10:44 20 firm will be taking that up.

10:44 21 MR. DEZERN: Yes, Your Honor. David DeZern for Butch's
10:44 22 Rathole. And if you can hear me, may I proceed?

10:44 23 THE COURT: Yes, sir. Of course.

10:44 24 MR. DEZERN: So thank you.

10:44 25 Let me start first with Cameron's two new proposed

10:44 1 constructions. And my apologies to Mr. Cabello. I believe I
10:44 2 responded to the e-mail shortly before we jumped on the Zoom
10:44 3 call, but we may not have seen it once we all got logged in.

10:45 4 But he did presciently realize that we would not agree to
10:45 5 those constructions, and I think for two reasons.

10:45 6 First, we don't believe that now is the appropriate time
10:45 7 to be rewriting these terms to clarify what they mean when
10:45 8 either the spec or file history identify what these structures
10:45 9 are.

10:45 10 Second, we believe that the proposed constructions
10:45 11 continue to be too ambiguous and fail to apprise one of
10:45 12 ordinary skill as to what structure actually satisfies these
10:45 13 outlet branch limitations and how to determine whether or not a
10:45 14 system includes it or does not include it.

10:45 15 THE COURT: Well, Mr. DeZern, help me out there, because
10:45 16 the slides that were just shown to me actually went to the
10:45 17 figures and articulated exactly where the outlet branches were
10:45 18 disclosed in the figures in the patents. It seems to me that
10:46 19 that makes it much more difficult for you to argue
10:46 20 indefiniteness, and also for you to -- I get that you -- let me
10:46 21 start over.

10:46 22 It is unfair to you on one level that you just got the
10:46 23 construction this morning -- proposed construction. That is a
10:46 24 result, however, of what I'm trying to accomplish which is by
10:46 25 giving the preliminary constructions, motivating people to try

10:46 1 and prove on what they may have proposed before, knowing what
10:46 2 I'm thinking.

10:46 3 So I just want to put on the record that the blame for
10:46 4 what happened is probably the Court's fault. If -- Mr. Henry
10:46 5 and Mr. DeZern, if you feel like you -- I am persuaded that,
10:47 6 based on the argument I've heard, that the claim term is not
10:47 7 indefinite, if you all -- I'm talking about Mr. Henry and
10:47 8 Mr. DeZern -- feel like you would be better served by having
10:47 9 time to think about the proposal that the plaintiff made and
10:47 10 attempting to work out either that or a better proposal, I'm
10:47 11 happy to let you all do that.

10:47 12 But I am persuaded that they articulated a sufficient --
10:47 13 they established to me that it's not indefinite. So,
10:47 14 Mr. DeZern, I'll let you and Mr. Henry tell me what is the
10:47 15 course I could take that is most fair to your client to make
10:47 16 sure that your rights are protected, that the claim
10:47 17 construction that I give is an appropriate one.

10:47 18 MR. HENRY: Your Honor, we would like to have a bit of
10:47 19 time to perhaps confer with both our codefendant and Cameron
10:48 20 before responding to this. We just simply can't in this short
10:48 21 notice --

10:48 22 THE COURT: Got it. And maybe your client.

10:48 23 MR. HENRY: Certainly.

10:48 24 (Laughter.)

10:48 25 THE COURT: Well, why don't we do this. Why don't we do

10:48 1 this. You all -- I always hate it when I say that. If the
10:48 2 counsel -- I'm not going to find this is indefinite. I'm not
10:48 3 prepared on the spot to force, Mr. Henry, your client or
10:48 4 Mr. Dezern's client, to on the spot fight over this. I don't
10:48 5 know that that's fair either.

10:48 6 You all can -- you all meaning truly in your case the
10:48 7 defendants, because the plaintiffs have articulated what they
10:48 8 think is correct. If the defendants would like to submit a --
10:48 9 and by the way, to the extent you do this, your argument that
10:48 10 it's indefinite is preserved. However, if you -- with that
10:49 11 understanding, if the defendants -- either defendants would
10:49 12 like to submit a counterproposal to what the plaintiffs have
10:49 13 submitted to me, you can do that. Just, you know, send it to
10:49 14 Evan, my law clerk, and we'll review it. And whenever we get
10:49 15 it -- as soon as we get it from you, we'll select the one we
10:49 16 think is the best. And that's the one we will make final.

10:49 17 And I'll also go ahead, as is my custom, at the end of the
10:49 18 hearing is when I lift the stay on discovery. I don't know
10:49 19 that we need to delay discovery commencing to get this one
10:49 20 claim term resolved. Because as soon as I get from you all
10:49 21 counterproposals, you'll have within a day or two what their
10:49 22 final construction is.

10:49 23 If any of the counsel feel like they have been
10:49 24 disadvantaged by not getting to argue why an alternate claim
10:50 25 term is necessary or better, again, let Evan know and we'll

10:50 1 probably just have a quick phone conference. And I'll hear
10:50 2 from Mr. DeZern and Mr. Cabello, if you would like to make
10:50 3 arguments, about why your alternative is better than what
10:50 4 plaintiffs have proposed. And we can do that next week.

10:50 5 MR. KEVILLE: Your Honor, John Keville, if I may.

10:50 6 I understand perfectly and I'm perfectly acceptable with
10:50 7 that. Just as a point of clarification, though, it was only
10:50 8 Butch's that said this term was in dispute. Nitro was fine,
10:50 9 apparently, with the plain and ordinary meaning, did not raise
10:50 10 this as a term in dispute.

10:50 11 So I'm not sure if Your Honor intends for Mr. Cabello to
10:50 12 have a new chance to now put this term in dispute when he was
10:50 13 fine with plain and ordinary meaning, or is this just between
10:50 14 Cameron and Butch's --

10:50 15 THE COURT: No. I think if I'm going to allow you to
10:50 16 articulate a new -- if I'm going to allow the plaintiff to say
10:51 17 that that's what the plain and ordinary meaning is, I think
10:51 18 Mr. Cabello should get to weigh in on that as well.

10:51 19 And by that I mean Mr. Cabello can either say he's okay
10:51 20 with that as the plain and ordinary meaning or he's not. And
10:51 21 if he's not and he thinks -- I doubt Mr. -- well, I'll let
10:51 22 Mr. Cabello do what he wants.

10:51 23 If Mr. Cabello thinks now, having heard that, that plain
10:51 24 and ordinary meaning needs to have a more refined meaning, he
10:51 25 can suggest that to the Court as well. And I'll look at the

10:51 1 counter arguments that are made in that regard.

10:51 2 MR. CABELLO: Your Honor, we certainly intend to weigh in
10:51 3 on this issue. You know, it's one thing to say we both -- we
10:51 4 being --

10:51 5 THE COURT: Mr. Cabello, you've won.

10:51 6 MR. CABELLO: Okay.

10:51 7 THE COURT: So, no. You get to weigh in. So you have the
10:52 8 panoply of responses. You're okay with it, you're not okay
10:52 9 with it, you're not okay with it and it should be something
10:52 10 different. Whatever, Mr. Cabello, however you want to weigh
10:52 11 in, you discuss that with Mr. Henry and Mr. Keville. I have
10:52 12 the plaintiff's proposal. I'll await a proposal from
10:52 13 Mr. Cabello, you and Mr. Henry. Once I have those, I'll look
10:52 14 at them and see which one I think is the most appropriate.

10:52 15 So let's move on to the next claim term which is the
10:52 16 "second connection block." I'm sorry. That's not right. Give
10:52 17 me one second.

10:52 18 The next claim term to take up is "positioned at," and
10:52 19 this is also Nitro only. So if I can hear from counsel for
10:53 20 Nitro on this one.

10:53 21 MR. CABELLO: Thank you, Your Honor.

10:53 22 THE COURT: Yes, sir. And this is the one earlier -- just
10:53 23 to make clear on the record, this is the one earlier you said
10:53 24 you wanted to make sure you had an opportunity to speak on.
10:53 25 And so I just want the record to reflect that this is your

10:53 1 opportunity to do so.

10:53 2 MR. CABELLO: Thank you, Your Honor.

10:53 3 THE COURT: Yes, sir.

10:53 4 MR. CABELLO: First of all, I wanted to start out with the
10:53 5 claim term and focus the Court on the first and second
10:53 6 connection block because the claim language says "a first
10:53 7 connection block positioned at the well fracturing tree."

10:53 8 And then it goes on. It says, "a connection block; and."

10:53 9 So we know that there has to be more than just a
10:53 10 connection block. And so if in fact Cameron had intended for
10:54 11 there just to be two connection blocks, they could have said
10:54 12 so. But they went on and said a second -- a first connection
10:54 13 block positioned at the well fracturing tree. And they didn't
10:54 14 tell us where it was positioned. They just said it's
10:54 15 positioned.

10:54 16 And that's our fundamental dispute with this term is what
10:54 17 does "positioned at" mean? And so we've got at least an
10:54 18 illustration, taking Figure 3 of the patent. And you can see
10:54 19 where this proffered term "attached to" is really irrelevant to
10:54 20 the position or distance, because it can be directly attached.
10:54 21 It can be indirectly attached, as is illustrated by the two far
10:54 22 connection blocks, and then the one on the -- in the middle
10:54 23 which is indirectly attached with respect to the far left
10:54 24 illustration.

10:55 25 Moreover and moving on to the next slide, "adjacent to" is

10:55 1 subjective and also therefore indefinite. We see this notion
10:55 2 of adjacent twice in the specification talk about adjacent
10:55 3 wellheads. And then also about the adjustment joints and the
10:55 4 length of the conduit between adjacent connection blocks, 48.
10:55 5 And so you have this concept of adjacent being subjective and,
10:55 6 we believe, indefinite.

10:55 7 Moving on to the next slide.

10:55 8 Cameron's position that meaning of "positioned at" depends
10:55 9 on a particular configuration I think really drives home and
10:55 10 illustrates the indefiniteness. I mean, how do you know? Do
10:55 11 you have to go ask Dr. Wooley whether something is positioned
10:56 12 at? And so you see this in Cameron's responsive brief. They
10:56 13 focus on the depending on the arrangement of a given system.

10:56 14 And I'm not going to read these quotes to the Court. I
10:56 15 know that you can read them faster than I can. But you see
10:56 16 that Cameron really provides us no -- and certainly the
10:56 17 specification provides us with no guidance at all as to what
10:56 18 "positioned at" means. Cameron has certainly briefed it in a
10:56 19 manner that only creates more ambiguity and really drives home
10:56 20 the fact that this term is indefinite.

10:56 21 Certainly the '132 patent provides no standard or method
10:56 22 for making the determination as to what is "positioned at." We
10:56 23 think, you know, certainly one illustration that -- is that
10:56 24 merely putting it close to might be positioned at, but we don't
10:57 25 know.

10:57 1 And so when you look at the goal of the claims is to
10:57 2 provide guidance to the public as to what -- where the metes
10:57 3 and bounds of the claim is, we don't believe that it's
10:57 4 adequately provided in this claim term "positioned at."

10:57 5 And with that, I'll stop, Your Honor.

10:57 6 THE COURT: Mr. Keville?

10:57 7 MR. KEVILLE: Yes, Your Honor. I'm going to let the
10:57 8 attorney who's smarter than me handle this one as well.

10:57 9 MR. LOGAN: Thank you, Your Honor. Mr. Cabello, many of
10:57 10 his remarks are directly pointed at Cameron's proposed
10:58 11 construction in this case that had "attached to" or "adjacent
10:58 12 to."

10:58 13 Cameron, however, is perfectly fine with the Court's
10:58 14 preliminary construction of plain and ordinary meaning, because
10:58 15 Cameron believes the plain and ordinary meaning in this case is
10:58 16 reasonably certain. To be clear, the suggestion that
10:58 17 "positioned at" means attached to or adjacent to, Cameron
10:58 18 brought that forward in the Butch's litigation just simply
10:58 19 attempting to resolve the dispute between the parties there and
10:58 20 find some common ground, even though that ultimately wasn't
10:58 21 successful.

10:58 22 The question is, would a POSITA understand with reasonable
10:58 23 certainty what it means --

10:58 24 THE COURT: If I could ask you -- Mr. Logan, you just made
10:58 25 a comment that I actually meant to ask Mr. Cabello. It sounded

10:58 1 to me like a lot of what Mr. Cabello is arguing is indefinite
10:58 2 was actually what's contained in your proposed claim
10:58 3 construction; is that right? I mean, as opposed to arguing
10:58 4 just that "positioned at" is indefinite, a lot of his argument
10:59 5 was that the words that you used were indefinite in terms of
10:59 6 the claim construction that you proposed. Did I get that
10:59 7 right?

10:59 8 MR. LOGAN: Your Honor, I don't know if you're directing
10:59 9 that to me or Mr. Cabello. That was my understanding. Yes,
10:59 10 Your Honor.

10:59 11 THE COURT: Mr. Cabello, why don't you -- Mr. Logan, you
10:59 12 can leave your slides open.

10:59 13 But, Mr. Cabello, that was the impression I got from your
10:59 14 argument.

10:59 15 MR. CABELLO: It was certainly in Cameron's briefing
10:59 16 directly responsive to the claim terms as we raised them. This
10:59 17 is -- while it may have been in Nitro -- I'm sorry -- in
10:59 18 Butch's Rathole's briefing, it was also in Nitro's briefing.

10:59 19 So what I had taken what we're using is clearly what was
10:59 20 in the briefing papers exchanged by Cameron and Nitro in this
10:59 21 particular case.

10:59 22 THE COURT: No. Mr. Cabello, you may be missing my point.
11:00 23 And I'm sure that's my fault. My sense is that -- give me one
11:00 24 second.

11:00 25 So we're arguing over whether or not "positioned at" is

11:00 1 indefinite. But my sense was from your argument that you are
11:00 2 arguing that the words that plaintiff used for their
11:00 3 construction, proposed construction, was what was indefinite.
11:00 4 That was what I took away, and I just want to make sure -- that
11:00 5 was the way I took it.

11:00 6 MR. CABELLO: Your Honor, if I may. I'm going to ask
11:00 7 Mr. Zinda to take this issue up, because he's trying to get my
11:00 8 attention on some briefing. And I'm just going to go ahead and
11:01 9 turn it over to him.

11:01 10 THE COURT: I'm always happy for whoever knows best to
11:01 11 speak. Or more than one person. I'm just trying to get to the
11:01 12 right answer.

11:01 13 MR. ZINDA: Yes, Your Honor. Thank you for giving me an
11:01 14 opportunity to speak.

11:01 15 We did take the position that the phrase "positioned at"
11:01 16 was indefinite. That was actually the first portion in our
11:01 17 opening brief. But we did largely focus on what Cameron had
11:01 18 proposed as their construction, because we believe that just
11:01 19 illustrates how indefinite the term is. Even under their
11:01 20 proposal, their interpretation of the claim, particularly for
11:01 21 the term "adjacent," which we contend is very subjective, we
11:01 22 believe there's no way for a POSITA to understand whether
11:01 23 being -- having a connection block with five feet from the tree
11:01 24 or 50 feet the tree falls within or outside the scope of the
11:01 25 claims. And that was sort of the crux of our entire argument.

11:01 1 But we did take the position that the phrase "positioned at" is
11:01 2 indefinite.

11:01 3 THE COURT: So let me ask you this. Let's say I were to
11:01 4 disagree and find that it was not indefinite, which is my
11:02 5 preliminary construction, is it your -- is it Nitro's position
11:02 6 that you would not be able to find an expert who could use the
11:02 7 construction that was proposed by the plaintiff would not be
11:02 8 able to understand it and use it either for infringement or
11:02 9 invalidity?

11:02 10 MR. ZINDA: Your Honor, I don't think there's any question
11:02 11 that you could find an expert that could give you his or her
11:02 12 opinion on what "adjacent to" means. The problem is is that
11:02 13 you're going to get inconsistent opinions from experts, because
11:02 14 "adjacent to" just -- at least from my perspective as a
11:02 15 layperson -- is a moderately subjective term.

11:02 16 Is five feet adjacent? Is ten feet adjacent? There's not
11:02 17 a consensus on that. There's no objective way to determine
11:02 18 what "adjacent to" means. And in fact, there's nothing in the
11:02 19 specification that they pointed to, there's nothing in the
11:02 20 industry that they pointed to that a POSITA would go look to to
11:02 21 determine whether something is considered "adjacent to" or not.

11:03 22 And so that's our issue with that particular term
11:03 23 "adjacent to," is it's very subjective. And Cameron is now
11:03 24 taking the position, well, it could be five feet or it could be
11:03 25 50 feet. It just depends on the particular configuration of

11:03 1 your well site.

11:03 2 Well, we're all ears to hear what these different
11:03 3 configurations are that would help you figure out whether
11:03 4 you're within or outside the scope of the claims. The problem
11:03 5 we have is, we don't think that exists. We don't think there's
11:03 6 any objective way for you to determine whether you're within or
11:03 7 outside the scope of the phrase "adjacent to" or "positioned
11:03 8 at," Your Honor. Sorry.

11:03 9 THE COURT: Isn't that really true in just about every
11:03 10 case that I have? I mean, for example here, you know, if the
11:03 11 plaintiff's expert takes a position that something is adjacent
11:04 12 to, and it's -- then your person says as a person of skill in
11:04 13 the art, no. No one in the oil and gas industry would believe
11:04 14 that 50 feet away is adjacent to. I think he's wrong. We
11:04 15 don't infringe. And then the jury sits there and decides
11:04 16 whether or not they think which of the two experts is correct
11:04 17 about whether it was adjacent to or not. I think I've seen
11:04 18 that in about every patent case I've ever had. You know, I
11:04 19 mean, that's why we have people, you know, skilled in the art.

11:04 20 But at any rate, I've gotten you off track a little bit.
11:04 21 Why don't we go back to Mr. Logan, and I'll let him finish.
11:04 22 And then of course I'll let anyone who wants to on behalf of
11:04 23 Nitro respond when he's done.

11:04 24 MR. LOGAN: Thank you, Your Honor. And I actually
11:04 25 appreciate that clarification. That was very helpful from

11:04 1 Nitro about what its position is today at the hearing.

11:04 2 The issue here is, and Your Honor pointed it out properly,
11:05 3 that these are standard litigation issues that Nitro is
11:05 4 pointing to. Nitro says it has no doubt it would be able to go
11:05 5 find an expert that could tell it, in a particular system, that
11:05 6 expert's opinion about whether it's positioned at the
11:05 7 fracturing tree or not.

11:05 8 Nitro's concern is there may be inconsistent opinions
11:05 9 between experts. Your Honor, that's a hallmark of litigation.
11:05 10 It shows that the term's understandable, but there may be
11:05 11 factual disputes that need to be resolved.

11:05 12 Nitro also, in responding just now, said that Cameron
11:05 13 raised the issue of whether, you know, a connection block
11:05 14 50 feet away might be part of a system. That's not quite true.
11:05 15 Nitro actually raised that in its briefing. Cameron's response
11:05 16 was simply limited to figuring out where a block is in any
11:05 17 particular accused system or prior art system. And whether
11:05 18 it's positioned at the tree is a factual determination, an
11:05 19 opinion issue that experts can make and maybe differ upon, that
11:06 20 have to be resolved, and that's perfectly acceptable within the
11:06 21 context of patent litigation as the Court alluded to.

11:06 22 So the important question here really is just would a
11:06 23 POSITA understand with reasonable certainty what it means for
11:06 24 something to be positioned at the fracturing tree? The claims
11:06 25 give some examples of things that are positioned at the

11:06 1 fracturing tree. It gives an example of attaching to a valve
11:06 2 at the well fracturing tree in Claim 10.

11:06 3 So, you know, from those disclosures from looking at the
11:06 4 figures, Dr. Wooley, for instance, was able to opine, you know,
11:06 5 the connection block could be part of the stack of valves
11:06 6 that's on the fracturing tree. The connection block could just
11:06 7 be adjacent to and connected to one of those valves.

11:06 8 There's various different configurations you could have
11:06 9 like with many claims, where a claim term might be satisfied.
11:06 10 That doesn't mean the claim term's not reasonably certain. It
11:06 11 simply means, rather unremarkably, that there may be multiple
11:06 12 embodiments, and that to get an opinion about how the, you
11:07 13 know, connection box positioned at a certain embodiment does
11:07 14 require looking at that embodiment.

11:07 15 As far as background understanding goes, Dr. Wooley didn't
11:07 16 base his opinion simply on speculation. It wasn't conclusory.
11:07 17 He talked about the prior art. He talked about how POSITAs
11:07 18 have an understanding from their education and experience. An
11:07 19 example of this would be with frac heads which are positioned
11:07 20 at fracturing trees.

11:07 21 On some fracturing trees, like the one here on 42, the
11:07 22 frac head's positioned on top of the tree. On other fracturing
11:07 23 trees, horizontal fracturing trees, the frac head's positioned
11:07 24 at different places on the tree. But looking at any of those
11:07 25 systems, a POSITA can tell with reasonable certainty whether or

11:07 1 not that component is positioned at the fracturing tree.

11:07 2 So really the question here is, and what defendants are
11:07 3 arguing, or more specifically at this point what Nitro is
11:07 4 arguing, is that they want some absolute precision. In their
11:07 5 briefing they say, we want to know, is it six inches away?
11:08 6 What about five? What about 50? They don't want to
11:08 7 necessarily tailor this to any particular system or any
11:08 8 particular arrangement or give any surrounding contextual
11:08 9 details. They want to know with mathematical precision, at
11:08 10 what measurement -- they want to get a ruler out and exclude
11:08 11 systems based on that.

11:08 12 And, Your Honor, I daresay if that were the standard,
11:08 13 probably the MPEP would have to be rewritten, and this Court
11:08 14 would be knee-deep in having to try to invalidate patents
11:08 15 because that demands the type of precision that the Supreme
11:08 16 Court said was unattainable and not necessary to satisfy the
11:08 17 definite standard in Nautilus.

11:08 18 So, Your Honor, you know, with those issues in mind, I
11:08 19 think that the question of whether it's positioned at a
11:08 20 fracturing tree, it's reasonably certain, it's a simple term,
11:08 21 and it's certainly a simple term to someone like a POSITA who
11:08 22 has experience and education in the art. And for that reason,
11:08 23 we believe that the Court's preliminary construction of plain
11:09 24 and ordinary meaning was correct.

11:09 25 THE COURT: I'm happy to hear any response.

11:09 1 MR. ZINDA: Yes, Your Honor. So the only additional
11:09 2 comment I have, Your Honor, is there's simply no objective way
11:09 3 for a person of ordinary skill in the art to determine what
11:09 4 "adjacent to" means. They've offered expert testimony that
11:09 5 they -- that a POSITA could figure out what it means. We've
11:09 6 offered expert testimony that says there's no objective way to
11:09 7 determine whether something's adjacent to a wellhead or not.
11:09 8 And we believe that there's simply no evidence that there is an
11:09 9 objective way of making that determination, that that's
11:09 10 standard in the industry. And there's certainly nothing in the
11:09 11 specification that would allow a POSITA to make that
11:09 12 determination. And, again, that's why we believe the term is
11:09 13 indefinite.

11:10 14 THE COURT: Anything else?

11:10 15 MR. ZINDA: No, Your Honor.

11:10 16 THE COURT: Okay. I'll be right back.

11:11 17 (Pause in proceedings.)

11:11 18 THE COURT: We're back on the record.

11:11 19 The Court is going to give as its final construction plain
11:11 20 and ordinary meaning, which is a first connection block
11:11 21 attached to or adjacent to the well fracturing tree.

11:11 22 The last claim term, my understanding is that you all
11:11 23 wanted to take up, is fracturing tree. And this is in the
11:11 24 Nitro case.

11:11 25 MR. CABELLO: Yes, Your Honor. We're going to start out

11:11 1 at Slide 23. And I want to ask Mr. Zinda to take this issue.

11:11 2 MR. ZINDA: Just give me one moment, Your Honor.

11:11 3 So the crux of the issue for frac tree, Your Honor, is
11:11 4 essentially whether a frac tree is a tree that's simply used
11:11 5 for fracturing, or it's a specialized tree that's used only for
11:11 6 fracturing. Cameron's taking the latter position.

11:12 7 I think it's important to first note that there's no
11:12 8 dispute that a ordinary production tree is and can be used for
11:12 9 fracturing operations. Now, are there -- is there a
11:12 10 specialized tree that some uses for fracturing? Yes. And
11:12 11 those trees are used because production trees tend to wear out
11:12 12 quicker if you fracture through them.

11:12 13 But there's no dispute that an ordinary Christmas tree can
11:12 14 be fracked through, and that there's a higher pressure rating
11:12 15 tree that can also be fractured through that's more commonly
11:12 16 used for fracturing operations.

11:12 17 Now, this exact issue was disputed in front of the Patent
11:12 18 Office on a related patent which is a earlier patent in this
11:12 19 family. The '645 patent is a continuation of that patent -- or
11:12 20 indirect continuation -- excuse me, Your Honor. And the board
11:12 21 expressly rejected in their final written decision under the
11:12 22 same claim construction standard Cameron's position that you
11:12 23 had to have some specialized tree that was installed only for
11:13 24 fracturing operations.

11:13 25 And, in fact, Cameron's expert which also testified that

11:13 1 ordinary Christmas trees -- I'm sorry -- that fracturing trees
11:13 2 don't always have to have physical characteristics that are
11:13 3 greater than that of an ordinary Christmas tree, such as higher
11:13 4 pressure rating and larger internal diameter.

11:13 5 And so if you look at Cameron's definition of a frac tree,
11:13 6 you'll notice that it says typically and generally it will have
11:13 7 larger bores and higher pressure ratings. What does that mean?
11:13 8 It means it doesn't always have to have a larger bore and
11:13 9 higher pressure rating. It means it could be an ordinary
11:13 10 Christmas tree that you use for fracturing which was consistent
11:13 11 with the practice at the time of the invention as admitted by
11:13 12 Cameron's own expert.

11:14 13 Now, let's look at some other definitions relating to
11:14 14 trees, just for Christmas tree. As you'll note here, Your
11:14 15 Honor, these definitions don't just limit trees to production
11:14 16 fluids. They say other fluids. And that's because it was
11:14 17 known at the time that a tree, an ordinary tree, Christmas
11:14 18 tree, could be used for both fracturing and production. And
11:14 19 it's actually consistent with the specification. The
11:14 20 specification specifically teaches that the frac tree in the
11:14 21 patent, that's Element 20, you can produce frac fluids or
11:14 22 production fluids through the tree.

11:14 23 And so, Your Honor, our biggest issue with their proposed
11:14 24 construction that we think is clearly incorrect is that a
11:14 25 fracturing tree has to be a specialized component. Our

11:14 1 position is that a frac tree is simply a tree used for
11:14 2 fracturing. Could be an ordinary production tree used for
11:14 3 fracturing, could be a specialized tree used for fracturing.
11:14 4 It's not exclusive of one or the other.

11:15 5 And with that, Your Honor, I'll be more than happy to
11:15 6 answer any questions you might have.

11:15 7 THE COURT: Yes. Here's my question. This is one -- you
11:15 8 know, occasionally I'll go through, and I'm not a big fan of
11:15 9 extrinsic evidence, but it occurred to me on several of these
11:15 10 claim terms that in the oil and gas field, for example, there
11:15 11 are claim terms that have a plain and ordinary meaning. And
11:15 12 the reason I care about that is that when a person is drafting
11:15 13 a patent and they write down -- or in this case a frac -- you
11:15 14 know, a fracking tree or fracturing tree or -- and, you know, I
11:15 15 can go and look up and see that frac tree is part of
11:15 16 Schlumberger's oil field glossary.

11:15 17 In other words, it's -- I worry that, you know, when
11:16 18 someone's writing a patent and they use a claim term not just
11:16 19 for a POSITA but, you know, for people who are in that field
11:16 20 where they will automatically or should know that's something
11:16 21 that's used, absent narrowing it in some way where they say
11:16 22 this is a unique fracturing tree or this is -- or where you're
11:16 23 inventing a kind of fracturing tree where you are narrowing
11:16 24 what it means, I tend to think that plain and ordinary meaning
11:16 25 is appropriate for that or that it's well-known in that field.

11:16 1 What do you think about that?

11:16 2 MR. CABELLO: Your Honor, if I may. This is David
11:16 3 Cabello.

11:16 4 THE COURT: Yes, sir.

11:16 5 MR. CABELLO: The issue we have here -- and you're going
11:16 6 to see it.

11:16 7 THE COURT: Mr. Cabello, I'm having a hard time hearing
11:16 8 you, and that may be just because I'm old, but if you could --

11:17 9 MR. CABELLO: I'll get the speaker up closer, or the mic
11:17 10 up closer, Your Honor.

11:17 11 I think the issue we're going to see here comes when we
11:17 12 get to invalidity positions, because the prior art has used
11:17 13 production trees, Christmas trees and frac trees
11:17 14 interchangeably. Sometimes fracking is done with a production
11:17 15 tree and sometimes it's done with this specialized tree.

11:17 16 Your proposed construction, and certainly Cameron's
11:17 17 proposal, would permit the argument that, well, gee whiz.
11:17 18 That's a production tree, it's not a frac tree and therefore it
11:17 19 doesn't invalidate this patent.

11:17 20 And I understand that the Court may not be too enamored
11:17 21 with extrinsic evidence, but I don't think we have to look at
11:17 22 extrinsic evidence because the '645 patent -- and this was the
11:17 23 last slide that was used by Mr. Zinda -- clearly shows that a
11:18 24 frac tree can either be used for fracturing fluids or
11:18 25 production fluids.

11:18 1 And so we don't see there is a need to limit what kind of
11:18 2 tree or to talk about a fracturing tree being a specialized
11:18 3 tree. It can be any kind of tree that is used for -- I'm
11:18 4 sorry -- in a fracturing operation, whether it's production or
11:18 5 fracturing.

11:18 6 And the specification, the intrinsic evidence in this case
11:18 7 clearly permits that a frac tree can either be used in
11:18 8 production or fracturing, therefore no specialized tree. A
11:18 9 frac tree is just a tree that is used in the fracturing
11:18 10 operations.

11:18 11 THE COURT: So I'm actually -- this is -- you read me
11:18 12 backwards. This is actually one where I'm -- and I'm not
11:18 13 usually a big fan of extrinsic evidence, but this is one where
11:19 14 I'm saying the extrinsic evidence seemed to me to be uniform,
11:19 15 that the word "fracturing tree" actually does have a meaning.

11:19 16 MR. CABELLO: I'm sorry. You say the fracturing tree
11:19 17 actually has a meaning?

11:19 18 THE COURT: In other words, it is not interchangeable with
11:19 19 the others, that it actually is -- you know, that people know
11:19 20 that a frac tree is a specific kind of -- a specific product
11:19 21 that's designed for a specific use in fracking.

11:19 22 MR. CABELLO: Well, Your Honor, I guess I respectfully
11:19 23 disagree.

11:19 24 First of all, there's no need to look at the extrinsic
11:19 25 evidence, because the intrinsic evidence tells us that a frac

11:19 1 tree can be used for either production fluids or fracturing
11:20 2 fluids, first and foremost.

11:20 3 Secondly, the extrinsic evidence supports the intrinsic
11:20 4 evidence because it describes these kinds of trees as generally
11:20 5 having these kinds of fluids. But it doesn't exclude -- a
11:20 6 production tree doesn't exclude the use of a production tree
11:20 7 for use in fracturing operations.

11:20 8 And so we believe that the extrinsic evidence is certainly
11:20 9 consistent with the intrinsic evidence, and that is that no
11:20 10 specialized tree is required.

11:20 11 THE COURT: Let me hear a response to that.

11:20 12 MR. LOGAN: Thank you, Your Honor. Yes.

11:20 13 The primary dispute here, and I'll share Cameron's slides.
11:20 14 Mr. Zinda laid out -- Mr. Zinda, at the beginning of his
11:20 15 statement, he said, the real dispute between the parties at
11:20 16 this point is does fracturing tree mean some kind of
11:20 17 specialized tree? And then he said right after that that there
11:21 18 are fracturing trees that are specialized trees that, you know,
11:21 19 have the higher pressure ratings that don't need the tree
11:21 20 savers, that are able to be fractured directly through, that
11:21 21 are distinct from production trees.

11:21 22 And with those two things being true, Cameron's argument,
11:21 23 the gist of it is, the meaning, the use of those very specific
11:21 24 words "fracturing tree" in the claim. Not oil field tree, not
11:21 25 production tree, that should have some meaning. It should be

11:21 1 imparted with meaning.

11:21 2 Mr. Cabello argues, well, when we get to invalidity, we
11:21 3 want to be able to read production trees on to fracturing
11:21 4 trees, because you could fracture through a production tree as
11:21 5 well.

11:21 6 But that's exactly the point, Your Honor. The patentee
11:21 7 here chose a more specific component, a fracturing tree. Not a
11:21 8 standard Christmas tree, not a production tree. If
11:21 9 Mr. Cabello's premise was correct that, you know, Cameron is
11:21 10 arguing you can only fracture through a fracturing tree, there
11:21 11 would be no need for a dispute. But that's not what Cameron's
11:22 12 saying. Cameron's never disputed that you can't fracture
11:22 13 through a production tree.

11:22 14 Cameron's dispute, Cameron's position is that fracturing
11:22 15 tree, as Your Honor mentioned, has a specific meaning in this
11:22 16 field. And that when the patentee used that term, it should be
11:22 17 respected as being towards that special meaning, not towards
11:22 18 more general meaning like Christmas tree or production tree.

11:22 19 And Your Honor's right that here the extrinsic evidence is
11:22 20 helpful, because this is a term that's understood in the art.
11:22 21 For instance, in showing that clip from the Schlumberger oil
11:22 22 field glossary, Mr. Zinda focused on the end of it where it
11:22 23 talks about maybe some have bigger bores, maybe some don't.

11:22 24 Notably, it says some have bigger bores and higher
11:22 25 pressure ratings. It may be correct that some just have a

11:22 1 normal size bore but still have higher pressure ratings.

11:22 2 But it's the first sentence that Mr. Zinda omits, which is
11:22 3 that it's a Christmas tree installed specifically for the
11:23 4 fracturing process. And then once we accept that premise that
11:23 5 there are these specialized Christmas trees, all the rest of
11:23 6 the extrinsic evidence makes sense.

11:23 7 On Slide 47 we have here Dr. Wooley who gives his opinion
11:23 8 that a fracturing tree is a specific type of Christmas tree
11:23 9 installed specifically for the fracturing process.

11:23 10 Now, no doubt Nitro will tell you, that's our expert, and
11:23 11 they don't agree with him. The problem is, Nitro had their own
11:23 12 expert during the IPR, John Ely. On Slide 47 it's John Ely's
11:23 13 opinion about what a fracturing tree is. John Ely was not
11:23 14 equivocal. This term has a generally accepted meaning in the
11:23 15 field. Specifically, a fracturing tree, also called a frac
11:23 16 tree or frac stack, is a specific type of Christmas tree.

11:23 17 And that wasn't just Mr Ely's opinion. Nitro adopted it
11:23 18 as well, very specifically. A fracturing tree or frac tree is
11:24 19 a specific type of Christmas tree. All of this --

11:24 20 Yes, Your Honor?

11:24 21 THE COURT: Keep that slide up there for a second. And if
11:24 22 I could hear -- I think it was Mr. Zinda who was arguing.

11:24 23 So, Mr. Zinda, what if, as my construction, I just take
11:24 24 exactly what you said in your petition, a fracturing or frac
11:24 25 tree is a specific type of Christmas tree installed

11:24 1 specifically for the fracturing process. I literally -- if I
11:24 2 quote what your client said it was during the IPR.

11:24 3 MR. ZINDA: Yes, Your Honor. I think the one thing that
11:24 4 we want to have clarified is that if you took an ordinary tree
11:24 5 and you installed it for a fracturing job, that tree is a frac
11:24 6 stack. That's a frac tree. That's our position, Your Honor.
11:24 7 It is not dependent on physical characteristics of the tree.

11:24 8 And of course if you put a tree in a well and you fracture
11:24 9 it, it was installed for fracking. It wouldn't be there if you
11:24 10 hadn't specifically intended for it to be there for fracking.

11:25 11 Now, might it also be used for production? Yes. A
11:25 12 production tree is used primarily for production. But there
11:25 13 are operators out there that go, well, I don't want to go buy a
11:25 14 really expensive tree that's got all these specialized
11:25 15 characteristics like higher pressure rating or higher -- a
11:25 16 greater flow passage. I would rather just frac through my
11:25 17 production tree and just let the production tree wear out a
11:25 18 little bit faster.

11:25 19 So we don't think -- we think they're taking our expert's
11:25 20 quote here and saying that that means that the tree's got to
11:25 21 have special physical characteristics. What our expert was
11:25 22 saying is the tree that you --

11:25 23 THE COURT: Well, let me interrupt you there, because even
11:25 24 in what you just said, if it were a production tree, you said
11:25 25 it might still be a fracturing tree if it was installed

11:25 1 specifically for the fracturing process, which is all -- which
11:25 2 is what you say here. And I would argue that the preliminary
11:26 3 construction we gave is a fracturing tree is not an ordinary
11:26 4 production tree and one that is used specifically for the
11:26 5 fracturing process. I mean, it seems to me a fracturing tree
11:26 6 is one that is used specifically for the fracturing process.

11:26 7 MR. ZINDA: Your Honor, I believe we agree with that. I
11:26 8 guess -- maybe this will help clarify the issue that we have
11:26 9 with their construction and kind of the way we think that
11:26 10 they're trying to take our former expert's testimony, is that
11:26 11 if you are looking, for example, Your Honor, at a piece of
11:26 12 prior art that has a tree, and the reference tells you that
11:26 13 they're fracking through the tree, our view is that that is a
11:26 14 fracturing tree. Whether it is also -- whether it's an
11:26 15 ordinary tree that's used for production or whether it's a
11:26 16 higher-rated tree that's primarily focused on fracturing,
11:26 17 that's where the rub is that we have is we think if there's a
11:26 18 tree and you're fracturing through it, that is a fracturing
11:27 19 tree.

11:27 20 THE COURT: If you all will hold on for just a second.

11:27 21 (Pause in proceedings.)

11:27 22 THE COURT: Okay, gentlemen. I think the Court's
11:28 23 preliminary construction is correct. The Court's final
11:28 24 construction is going to be -- for "fracturing tree" and
11:28 25 "fracturing trees" is going to be a fracturing tree is not an

11:28 1 ordinary production tree and is one used specifically for the
11:28 2 fracturing purpose.

11:28 3 And my understanding, but someone can correct me if I'm
11:28 4 wrong, that is all the claim terms you all wanted to take up
11:28 5 today; is that correct? Anyone can jump in.

11:28 6 MR. KEVILLE: That is all for Cameron, Your Honor.

11:28 7 THE COURT: Okay. And I'm assuming for everyone else. If
11:28 8 I'm wrong, Mr. Cabello or --

11:28 9 MR. CABELLO: That's all for Nitro.

11:28 10 THE COURT: Okay.

11:28 11 MR. HENRY: Your Honor, I -- oh, I'm sorry.

11:28 12 THE COURT: No. Go, please, Mr. Henry.

11:28 13 MR. HENRY: I just had a quick question. Ordinarily at
11:28 14 the end of your constructions on "one and only" and "single" I
11:28 15 might have asked for a clarification of exactly what plain and
11:28 16 ordinary meaning means. But as I understood, I just wanted to
11:28 17 be sure I was correct, that what you're suggesting is when we
11:29 18 exchange our infringement and invalidity submissions in the
11:29 19 future, that may raise that issue, and we may have a chance to
11:29 20 come back and request that clarification if it appears
11:29 21 necessary.

11:29 22 THE COURT: That was the first claim term we took up?

11:29 23 MR. HENRY: Yes, Your Honor. The one and only rigid
11:29 24 fluid --

11:29 25 THE COURT: Yes.

11:29 1 MR. HENRY: -- pathway and the single fluid conduit.

11:29 2 THE COURT: You are correct. I'm sorry, Mr. Henry. Yes.

11:29 3 You are correct. If when you exchange your expert reports on

11:29 4 that claim term and the experts have substantially differed in

11:29 5 their analysis of what the claim term means as its plain and

11:29 6 ordinary meaning, let me know. We'll have a mini -- I'll look

11:29 7 at what each expert did. I'll determine which is correct. And

11:29 8 someone's expert report will not be coming in.

11:29 9 MR. HENRY: Thank you, Your Honor.

11:29 10 THE COURT: So have we set a trial date?

11:30 11 MR. HENRY: I don't believe we have, Your Honor.

11:30 12 MR. KEVILLE: No, Your Honor.

11:30 13 THE COURT: Okay. Give me just a second. I'll check with

11:30 14 my law clerks and we'll come up with one. Give me one second.

11:30 15 (Pause in proceedings.)

11:32 16 THE COURT: Ladies and gentlemen, we're back on the

11:32 17 record.

11:32 18 I'm told that we are free for trial on August 23rd of next

11:32 19 year. That's when we'll be setting the trial.

11:32 20 MR. KEVILLE: Your Honor, this is John Keville for

11:32 21 Cameron. We have two cases here. Is Your Honor combining the

11:32 22 two cases for one trial, or is it going to be consecutive?

11:32 23 THE COURT: Thank you for asking. No. We will not be

11:32 24 combining them for trial. But we will -- they'll be both set

11:32 25 on that date and we'll figure out which one will go first,

11:32 1 assuming neither settles. As we get closer, we'll figure
11:32 2 out -- and we'll do the pretrial hearings at the same time.

11:32 3 MR. KEVILLE: Understood. Thank you.

11:32 4 THE COURT: And for those of you who have not been in
11:32 5 trial with me, you should plan on having a seven-person jury.
11:32 6 I give four strikes per side. You'll be doing your voir dire
11:32 7 in front of the magistrate judge the Thursday or Friday before
11:33 8 the trial starts. He typically asks questions for about an
11:33 9 hour in a very robust manner. And then you'll each have 30 to
11:33 10 45 minutes to do voir dire as well.

11:33 11 I could see -- and I could also see in this case, if both
11:33 12 cases are still going to trial, we may pick both juries at the
11:33 13 same time. I mean, we'll -- seriatim, but we may pick them on
11:33 14 the same day. We'll get a bigger panel and we'll pick two
11:33 15 juries, and then we'll start with one trial, and when it ends,
11:33 16 we'll start with the next trial.

11:33 17 And so you should anticipate on a two-patent case
11:33 18 somewhere between 13 to 15 hours per side.

11:34 19 That's about all I can think of. If you have any
11:34 20 questions off the top of your head, I'm happy to answer them.

11:34 21 MR. KEVILLE: None for plaintiff, Your Honor. Thank you
11:34 22 for that guidance.

11:34 23 THE COURT: Mr. Cabello?

11:34 24 MR. CABELLO: Your Honor, and the 13 to 15 hours per side
11:34 25 does not include the voir dire. Does it include the opening

11:34 1 and closing statements?

11:34 2 THE COURT: It does not include the voir dire, it does not
11:34 3 include the opening, it does not include the closing.

11:34 4 MR. CABELLO: Thank you, Your Honor.

11:34 5 THE COURT: Thank you for asking. I should have said
11:34 6 that.

11:34 7 And so I typically give about 30 minutes for opening,
11:34 8 about 30 minutes for closing per side. I'm not sitting there
11:34 9 with a stopwatch. I just think that's about the best time and,
11:34 10 you know, if you're somewhere in that neighborhood, you're
11:34 11 going to be fine.

11:34 12 Anything else we can -- hopefully by the time we try the
11:34 13 case, we'll have no Plexiglas® in my courtroom. And no masks.
11:34 14 But who knows?

11:34 15 MR. KEVILLE: Let's hope.

11:34 16 THE COURT: Anything else we can take up today?

11:35 17 MR. KEVILLE: Not for plaintiff, Your Honor.

11:35 18 THE COURT: Okay. Get us your counterproposals on that
11:35 19 one claim term as quickly as possible, just so -- for y'all's
11:35 20 sake more than mine. As soon as you get them to us, we'll get
11:35 21 a ruling out pretty quickly on that. You should anticipate an
11:35 22 order on -- a complete order on the Markman sometime within
11:35 23 about a month.

11:35 24 And so having -- and also just so you know, because this
11:35 25 came up yesterday, the ten months to trial is a little shorter

11:35 1 than what is in the Court's standard time. So you're going to
11:35 2 have to get together knowing when the trial date is and work
11:35 3 from there backwards to figure out your appropriate trial
11:35 4 dates, you know, discovery and exchange and everything.

11:35 5 If for some reason you can't work out what those dates
11:36 6 are, that's fine. You have to protect your clients. If you
11:36 7 can't work those dates out, call Evan and let me know and I'll
11:36 8 help you out with that as well on a quick hearing by phone.

11:36 9 Have a good Friday. Thanks to everyone for being here.
11:36 10 Thanks to the -- I don't know if they were younger people or
11:36 11 just more junior people, I don't know. Everyone's younger than
11:36 12 me on this call, so it doesn't matter. But to those people who
11:36 13 argued, I thought you did a very fine job. Have a good weekend
11:36 14 and be safe.

15 (Hearing adjourned at 11:36.)

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1 UNITED STATES DISTRICT COURT)
2 WESTERN DISTRICT OF TEXAS)

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4 I, Kristie M. Davis, Official Court Reporter for the
5 United States District Court, Western District of Texas, do
6 certify that the foregoing is a correct transcript from the
7 record of proceedings in the above-entitled matter.

8 I certify that the transcript fees and format comply with
9 those prescribed by the Court and Judicial Conference of the
10 United States.

11 Certified to by me this 19th day of October 2020.

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